(29,947)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 637

WESLEY M. SMITH, APPELLANT,

vs.

W. P. McCULLOUGH, B. E. BETH, THOMAS F. PHILLIPS, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Caption in C. C. A. Omitted in Printing

Caption in U. S. District Court Omitted

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

No. —. Equity

AMENDED BILL OF COMPLAINT—Filed September 11, 1916

W. P. McCULLOUGH, D. E. BETH, and T. F. PHILLIPS, Plaintiffs,

vs.

W. M. SMITH, Defendant

Complainants complain of the defendant and for their cause of action allege:

I. That the complainants W. P. McCullough and T. F. Phillips are respectively citizens and residents of the State of Oklahoma; that the complainant D. E. Beth is a citizen and resident of the State of Kansas; that the defendant W. M. Smith is a citizen and resident of the State of Kansas residing at Baxter Springs in the State of Kansas; that the value of the subject matter in controversy herein is in excess of the sum of Three Thousand Dollars ($3,000), exclusive of costs and interest; that the value of the right to possession of the mining lands, the subject of this suit, under and pursuant to the terms and conditions of the mining lease under which complainants claim, is in excess of the sum of Three Thousand Dollars ($3,000), exclusive of costs and interest.

II. That under and pursuant to that portion of the Act of Congress of the United States approved March 2, 1895, being a part of the Indian Appropriation Act for the year 1895 (28 Stats., page 927), providing for the allotment in severalty of certain lands theretofore set apart for the use of the Quapaw Tribe of Indians, and the individual members thereof there was allotted to Leander J. Fish the following described lands (and other lands) to-wit:

The East one-half of the Northwest one-fourth, and the Southeast one-fourth of the Northeast one-fourth of Section Thirty-two, Township Twenty-nine, Range Twenty-three East of the Indian Meridian, Ottawa County, Oklahoma, containing 120 acres.

III. That thereafter, to-wit; on the 26th day of September, 1806, the United States of America, pursuant to and under the terms and

conditions contained in the said Act of Congress, in due form issued to and in favor of the said Leander J. Fish a certain allotment patent in and to the hereinbefore described lands, said lands being located in what is now Ottawa County, Oklahoma, in the Eastern Judicial District of Oklahoma.

IV. That thereafter the Congress of the United States passed a certain Act, which was duly approved and became a law on June 21, 1906, (34 Stats., 325-344; Kappler's Indian Laws and Treaties, Vol. 3, page 211), as follows, to-wit:

That Leander J. Fish, an allottee of two hundred acres of land in Section Thirty-two, Township Twenty-nine, Range Twenty-three, east, and of forty acres in Section fourteen Township Twenty-nine, Range Twenty-four east, in the Quapaw Reservation, under the provisions of the Act of March second, eighteen hundred and ninety-five (Twenty-eighth Statutes, page nine hundred and seven), and the Act of March third, nineteen hundred and one (Thirty-first Statutes, page ten-hundred and fifty-eight), be, and he is hereby authorized to alienate such portion of said land as he may see fit, not exceeding one hundred and twenty acres, under such rules and regulations as the Secretary of the Interior may prescribe, and any conveyance of such land made by said Fish shall be executed subject to the approval of the Secretary of the Interior.

V. That thereafter, to-wit: on the 14th day of July, 1906, the said Leander J. Fish availed himself of the provisions of the said Act of Congress, and by and with the consent and approval of the Secretary of the Interior did alienate a portion of his said land, under and pursuant to the terms of the said Act, described as follows, to-wit:

The East one-half of the Northwest one-fourth, and the Southeast one-fourth of the Northeast one-fourth of Section Thirty-two, Township Twenty-nine, Range Twenty-three East of the Indian Meridian, Ottawa County, Oklahoma, containing 120 acres,

and did make, execute and deliver to one E. V. Kellett of Seneca, Missouri, a certain deed to the said hereinbefore described lands, with a defeasance clause thereunto attached, and said deed was thereafter, to-wit: on the 18th day of July, 1906, presented to the Department of the Interior of the United States and on said date recommended for approval by the Commissioner of Indian Affairs by indorsement on the said deed, as follows, to-wit:

"The within alienation is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

C. F. Larrabee, Acting Commissioner."

That thereafter, to-wit: on the 20th day of July, 1906, the said alienation was approved by the Honorable Secretary of the Interior of the United States by indorsement on the back of said instrument, as follows, to-wit:

"Department of the Interior, Received July 20th, 1906. Enc. No. 1, 12746, Indian Territory Division. Department of the Interior July 20th, 1906. The within alienation is hereby approved.

Thos. Ryan, Acting Secretary."

That thereafter this instrument was filed for record in the office of L. D. Einsel, Deputy Clerk and Ex Officio Recorder for the recording district of the Northern District of Indian Territory, then located at Miami, Oklahoma, and there recorded on the 28th day of July, 1906 in book F on pages 63-64 of said records, a copy of which said deed with defeasance clause attached, with the approval of the said alienation endorsed thereon by the Secretary of the Interior of the United States, is hereunto attached, marked Exhibit "A" and made a part of this Amended Bill of Complaint.

VI. That thereafter, to-wit: on the 4th day of August, 1906, the said E. V. Kellett duly and lawfully assigned the said instrument of alienation, to-wit: Exhibit "B," to the Alliance Trust Company, Limited, of Dundee, Scotland, which said assignment was thereafter, to-wit: One the 15" day of August, 1906, filed for record in the office of L. D. Einsel, Deputy Clerk and Ex Officio Recorder for the Northern Recording District of Indian Territory, then located at Miami, Oklahoma, and there recorded on the records of said office in Book — on page —, thereof; that thereafter, to-wit: On the 20th day of June, 1908, the said Alliance Trust Company, Limited, of Dundee, Scotland, in due form duly and lawfully re-conveyed the said premises to the said Leander J. Fish by a deed of release and conveyance, a copy of which said deed of release and conveyance is hereunto attached, marked Exhibit "B" and made a part of this Amended Bill of Complaint.

That thereafter, to-wit: On the 24th day of July, 1908, the said deed of release and conveyance was duly filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book — on page — of the records of said office.

VII. That thereafter, and on numerous occasions, the Honorable Secretary of the Interior of the United States, by his subsequent official acts with respect to said lands, ratified and confirmed said alienation and recognized it as an alienation, under and pursuant to the provisions of the Act of Congress of June 21, 1906, supra.

VIII. That thereafter, to-wit: On the 29th day of April, 1913, the said Leander J. Fish made, executed and delivered to one Dallas Hopper of Miami, Oklahoma, a certain mining lease, wherein and whereby he leased unto the said Dallas Hopper for mining purposes the hereinbefore described lands, a copy of which lease is hereunto attached, marked Exhibit "C," and made a part of this Amended Bill of Complaint; that thereafter, to-wit: On the 29th day of April, 1912, the said mining lease so made, executed and delivered, was by the said Dallas Hopper filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book 31 on page 167 of the records in said office.

IX. That thereafter, and prior to the beginning of this action, the said Dallas Hopper assigned all his right, title and interest in and to said mining lease to these plaintiffs, and they are now the owners and holders of the said lease and in possession of the said hereinbefore described land, under and pursuant to the terms and conditions thereof; that immediately upon the execution and delivery of the said mining lease, Exhibit "C," by the said Leander J. Fish to the said Dallas Hopper, the said Dallas Hopper entered into possession of the said premises under and pursuant to the terms and conditions contained in said mining lease, and ever since said time he and his assignees and now these plaintiffs, have remained in continuous possession of the said premises; that under and pursuant to the terms of said lease they have prospected and developed said land and have sunk numerous test or drill holes upon said land, and have sunk a shaft thereon and improved and developed the same for mining purposes.

X. That these plaintiffs claim a leasehold interest in and to said premises under the said mining lease, Exhibit "C," and the defendant claims an estate or interest therein adverse to these plaintiffs; that the claim of the defendant is without any right whatever, and that the said defendant has no estate, right, title or interest whatsoever in said land or premises or any part thereof.

Wherefore: Plaintiffs pray that the defendant be required to make due answer to Plaintiff's Amended Bill of Complaint herein (but not under oath, answer under oath being hereby expressly waived); that he be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by decree of this court; that by the said decree it be declared and adjudged that the defendant has no state or interest whatsoever in and to said land and premises, and that the title of the plaintiff is good and valid, under their said mining lease, Exhibit "C;" that the defendant be forever adjudged and debarred from asserting any claim in and to said land and premises adverse to the plaintiffs', and that the said mining lease or instrument, under which the said defendant claims an interest in said lands, be declared null and void and cancelled of record, and for such other and further relief as to the Honorable Court shall seem meet and agreeable in equity and good conscience together with the costs and disbursements of this action.

Paul A. Ewert, Attorney for Plaintiffs, 405–406 Frisco Building, Joplin, Missouri. A. C. Towne, Attorney for Plaintiffs, Miami, Oklahoma.

EXHIBIT "A" TO AMENDED BILL OF COMPLAINT

Mortgage

Leander J. Fish

to

E. V. Kellett

Know All Men By These Presents, That I, Leander J. Fish, a single man, for and in consideration of the sum of one dollar ($1.00) to me in hand paid, and the premises hereinafter set forth, do hereby grant, bargain and sell unto E. V. Kellett, of Seneca, Mo., and unto his heirs, and assigns forever, the following property; The northeast quarter and the Southeast Quarter of the Northwest Quarter and the Southwest Quarter of the northeast Quarter of Section 32, Township 29, North of Range 23, East, being in all one hundred and twenty acres (120) more or less, situated in the Quapaw Reservation, Indian Territory, being that part of my allotment of 240 acres of land made under the act of February 3rd, 1897, and February 19th, 1903, which I am authorized to alienate under the provisions of the act of Congress approved June 21st, 1906.

And I hereby covenant with the said E. V. Kellett, that I will forever warrant and defend the title to said property against all lawful claims. The sale is on the condition that whereas Leander J. Fish, is justly indebted to the said E. V. Kellett, in the sum of One Thousand Dollars ($1,000) evidenced by a certain promissory note dated July 12th, 1906, which is in words and figures following, $1,000.00 Washington, D. C. July 12th, 1906. Three years after date I promise to pay to the order of T. V. Kellett, One Thousand Dollars ($1,000) at the First National Bank of Seneca, Mo., value received with interest at 9 per cent per annum payable semi-annually until paid.

(Signed) Leander J. Fish.

Now, if I shall pay said moneys at the time and in the manner aforesaid then the above conveyance shall be null and void, and in case of nonpayment then the said grantee or assignee shall have the power to sell said property at public sale to the highest bidder for cash, at Wyandotte in the Quapaw Agency in the Indian Territory, Public notice of the time and place of said sale having first been given ten days by advertising in some newspaper published in said Territory by at least two insertions or by notices posted in public places in the Quapaw Reservation, at which sale the said grantee or his assignees may bid and purchase as any third person might do. I hereby authorize the grantee or assignee to convey said property to any one purchasing at said sale, and to convey an absolute title thereto, and the recitals of this deed of conveyance shall be taken as prima facie true, and the proceeds of said sale shall be applied, first, to the payment of all costs and expenses attending said sale. Second,

to the payment of said debt and interest, and the remainder if any shall be paid to the said grantor.

Witness My Hand And Seal on this the 14th day of July, 1906.
Leander J. Fish. Witnesses: J. D. Yoakley.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Be it remembered, that on this day came before me, the undersigned Notary Public, within and for the District aforesaid, duly commissioned and acting, Leander J. Fish, to me well known as the grantor in the foregoing deed, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and that he was and is a single man, the erasure of 24 and the insertion of 23, was made before the execution of the said mortgage deed.

Witness my hand and seal as such Notary Public on this 14th day of July, 1906.
J. D. Yoakley, Notary Public, D. C. (Seal.)

DISTRICT OF COLUMBIA, ss:

I, John R. Young, Clerk of the Supreme Court of record having a [—] do hereby certify that J. D. Yoakley, before whom the annexed instrument in writing was executed and whose name is subscribed thereto, was at the time of signing the same a Notary Public in and for said District duly commissioned and sworn and authorized by the laws of the said District to take acknowledgment and proof of deeds and other instruments in writing, to be recorded in said District, and to administer oaths; and that I am well acquainted with the hand writing of the said Notary Public and verily believe that the signature of said instrument is genuine.

In Witness Whereof, I have hereunto subscribed my hand and affixed the seal of said court at the city of Washington, D. C. the 18th day of July, A. D. 1906.
John R. Young, Clerk. (Seal.)

59326, Indian Office, Incl. No. 1, 1906. 62096. Indian Office Incl. No. 2, 1906. Department Of The Interior, Office of Indian affairs July 18th, 1906. The Within Alienation Is Respectfully Submitted To The Secretary Of The Interior, With The Recommendation That It Be Approved.
C. F. Larrabee, Acting Commissioner.

Department Of The Interior, Received July 20th, 1906. Enc. No. 12746. Indian Territory Division. Department Of The Interior July 20th, 1906. The Within Alienation Is Hereby Approved.
Thos. Ryan, Acting Secretary.

Office of Indian Affairs, Land Div., Recorded in Miscel., Record Book Vol. 5, page 454, July 23rd, 1906. Filed for Record the 28th day of July, A. D. 1906, at 8 a. m.

L. D. Einsel, Deputy Clerk and ex-officio Recorder.

Mailed to J. R. Campbell, July 28th, 1906. Vinita, Ind. Terr.

EXHIBIT "B" TO AMENDED BILL OF COMPLAINT

Release of Mortgage

Alliance Trust Company

to

Leander J. Fish

Loan No. 2281

For Value Received, The Alliance Trust Co., Limited, (Corporation duly incorporated and organized under the Laws of Great Britton and Ireland), of Dundee, Scotland, does hereby acknowledge full payment and satisfaction of one certain mortgage made and executed by said Alliance Trust Company, Limited, on the following described land situate in the Quapaw Reservation, Indian Territory, viz:

N. E. ¼ of N. W. ¼ of S. E. ¼ of N. W. ¼ and the S. E. ¼ of N. E. ¼ Section 32, Township 29, Range 23, East.

Bearing date July 14th, 1906, and recorded in the records of First Recording District I. T., in Book F. of—on page 63, on the 28th day of July, 1906, A. D. and hereby release the premises therein described from the lien of said mortgage and said trustee hereby recovers said premises to the makers of said mortgage their heirs and assigns.

In Testimony Whereof, It has caused these presents to be signed in its behalf by George Murray, its true and lawful attorney in fact, and said trustee has hereto set his hand and seal this 20th day of June, 1908.

The Alliance Trust Company, Limited, by George Murray, Its Attorney in Fact. (Seal.)

STATE OF MISSOURI,
County of Jackson, ss:

Before me, a Notary Public in and for said County and State on this 20th day of June, 1908, personally appeared George Murray, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its attorney in fact, and acknowledged to me that he executed the same as his free

and voluntary act and deed as attorney in fact, and as the free and voluntary act and deed of such corporation.

The Alliance Trust Company, Limited, of Dundee, Scotland, for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and Notarial Seal the day and year first above written.

Minnie B. Secrist, Notary Public in and for Jackson County, Mo. My commission expires April 7th, 1909. (Seal.)

EXHIBIT "C" TO AMENDED BILL OF COMPLAINT

Mining Lease

This Indenture, Made and entered into this 29th day of April A. D. 1912, by and between Leander J. Fish, of the Quapaw Reserve, in Oklahoma, an allottee of the Quapaw Tribe of Indians, party of the first part, and Dallas Hopper, of Miami, party of the second part:

Witnesseth: that the said party of the first part for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part receipt of which is hereby acknowledged, in consideration of the rents or royalties, undertakings and agreements hereinafter stated to be paid and performed by the said party of the second part, his successors, assigns, and sublessees, does by these presents demise and lease unto the party of the second part, successors and assigns, and sub-lessees the following described tracts or parcels of land, viz:

East half of Northwest Quarter and the Southeast Quarter of the Northeast Quarter of Section 32, Township 29, Range 23, East of the Indian Meridian, Oklahoma, containing One Hundred and twenty acres more or less for the term of ten years from the date hereof,

for the purpose of prospecting, mining, drilling, boring, or digging for oil, gas, asphaltum, lead, zinc, coal and copper and all and every other kind or kinds of valuable minerals, ore, fossil, or vegetable substance whatever, with the right to use as much of the surface of said land and so much of the building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations, also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery, and pipe lines upon said premises for successfully carrying on the business of boring, prospecting, mining and prosecuting the object of this indenture, with the right to remove or sell and remove all of said buildings, re-

fineries, machinery and pipe lines, at any time or at the expiration of this lease.

In case there shall not be found in any well so drilled oil, gas, coal, copper or other substances in paying quantities, then the said party of the first part to have said well for his own use, and party of the second part agrees to leave said well in good shape for water, provided said first party pay for the casing therein contained or furnish new casing of the same quality to the second part, if oil mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease.

Party of the first part reserves the right to go upon and visit said lands and mines at such times as may be desired to examine and ascertain the amount of product mined or produced thereon, said second party to have the free use of gas, oil, or coal to operate said property.

In consideration of which the said party of the second part agrees and binds his executors, administrators, assigns, and sublessees to pay or cause to be paid to the party of the first part his executors, administrators, or assigns, at Miami, Oklahoma, a sum of money equal to 5% per centum of the market value at the place mined, or produced, of all oil, gas, asphaltum, lead, [zinc], coal, copper and all other minerals or substances whatever, which may be mined or removed by the said party of the second part, his executors, administrators, assigns, or sublessees from said land herein leased, and such payments, or royalties or rent shall be made on or before the 15th day of each calendar month during the continuance of this lease for all oil, gas, asphaltum, ore and mineral products and substances above named, mined or removed from the land during the calendar month last preceding such date of payment.

Said party of the second part further covenants and agrees to exercise diligence in conducting said prospecting and mining operations, and to drill, bore, prospect, open and operate oil wells, shafts, drifts and mines for the ores, mineral products and substances above indicated, in workmanlike manner, and the said party of the second part further covenants and agrees that he will keep an accurate account of said mining operations showing the whole amount of oil, ores, etc., mined or removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired to the amount of products mined or removed from said land under this lease.

The party of the second part hereby agrees to begin operations on the above described premises within 90 days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5c per acre yearly

for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same.

In Witness Whereof, the parties of the first and second parts have hereunto set their hands, and seals the day and year first above written.

Leander J. Fish. (Seal.) Dallas Hopper. (Seal.)

Signed and sealed in the presence of M. Duffee, J. C. William.

STATE OF OKLAHOMA,
County of Ottawa, ss:

Before me, O. B. Ballard, a Notary Public within and for said county and State, on this 29th day of April, 1912, personally appeared Leander J. Fish and Dallas Hopper, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me, that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and Notarial seal the day and year above set forth.

O. B. Ballard, Notary Public. My commission expires Nov. 16th, 1913. (Seal.)

Filed for record 4-29-1912-10 A. M. (Book 31, page 167.)) Lon Lampkin, Reg. Deeds.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

CHANCERY SUBPŒNA

To W. M. Smith, Miami, Okla., Greeting:

We command you and every one of you, that you appear before our Judge of our District Court of the United States of America for the Eastern District of Oklahoma, at the City of Muskogee, in said District, on or before the twentieth day after service of this writ, excluding the day thereof, to file answer or other defense to the Bill of Complaint of W. P. McCullough, et al. this day filed in the Clerk's office of said Court in said City of Muskogee, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Eastern District of Oklahoma to execute and make due return of this writ, on the 21st day of July 1916.

Witness the Hon. Ralph E. Campbell, Judge of said Court, this 1 day of July A. D. 1916.

R. P. Harrison, Clerk. L. S. Trimble, Deputy Clerk.

MEMORANDUM.—The above named defendant is notified that unless he file answer or other defense in the Clerk's office of said Court, at the City of Muskogee aforesaid, on or before the twentieth day after service, excluding the day thereof, the bill of complaint will be taken pro confesso and a decree entered accordingly.

R. P. Harrison, Clerk, by L. S. Trimble, Deputy Clerk.

2765a. No. 2305. Eq. District Court, United States, Eastern District of Oklahoma. W. P. McCullough, et al. vs. W. M. Smith. Chancery Subpœna. This writ is returnable 7/21, 1916 and same should be served and returned to this office before that date. Filed Jul. 25 1916 R. P. Harrison, Clerk U. S. District Court. P. A. Ewart and A. C. Towne, Compt's Sol. Render account immediately on form No. 25, charging a fee of $2.00.

U. S. MARSHAL'S RETURN

EASTERN DISTRICT OF OKLAHOMA, ss:

Received the within writ July 1 1916, and executed the same as folows, to-wit: Served on the within named July 15, 1916 at Miami, Okla.

E. D. Ballard, Deputy Marshal.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed September 11, 1916

Comes now the defendant herein and moves the Court to dismiss the plaintiff's complaint on account of the insufficiency of facts therein set forth to constitute a valid cause of action in equity against the defendant. The insufficiency of facts averred to constitute any valid cause of action in equity appears on the face of plaintiff's bill in the following particulars, namely:

I. It is averred in the second paragraph of the bill that the land described in the plaintiff's complaint was allotted to Leander J. Fish under, and pursuant to, the provisions of the Act of Congress approved March 2, 1895, and it is averred in the third paragraph of said bill that the United States of America, on the 26th day of September, 1896, pursuant to "the terms and conditions in the said Act of Congress" of March 2, 1895, in due form, issued on allotment of patent to said land to said Leander J. Fish, thus averring that said Leander J. Fish was, by law, prohibited from alienating said land for a period of twenty-five years from the date of said

patent; and it is averred in the fifth paragraph of the bill that said Leander J. Fish, on July 14, 1906, pursuant to an Act of Congress approved June 21, 1906, authorizing the said Leander J. Fish to alienate the land described in the plaintiffs' petition, by proper deed of conveyance, approved by the Secretary of the Interior, alienated and conveyed said land to E. V. Kellett; and it is averred in the seventh paragraph of the bill that said Leander J. Fish, on the 29th day of April, 1912, executed a mining lease on said land to Dallas Hopper; and it is avered in the eighth paragraph of the bill that said Dallas Hopper assigned all his right in said lease to the plaintiff, thus showing by the averments of the bill that plaintiffs' assignor, Dallas Hopper, acquired no right or title in any mining lease on said land, and that the plaintiffs have no right or title in or to any mining lease on said land.

II. It is averred in the fifth paragraph of the bill that Leander J. Fish, the holder of the land described in the plaintiff's petition, with a restriction upon his right to alienate the same for a period of twenty five years from date of the patent, on the 14th day of July, 1906, executed to E. V. Kellett a deed to the property described in plaintiffs' petition, with a defeasant clause thereto attached, thereby showing by the averments of said complaint that the restrictions upon said land were nowise affected by said E. V. Kellett, and that said conveyance was, and is, wholly void and illegal, because contrary to the provisions of the Statutes of the United States; and it is averred in the eighth clause of the plaintiffs' petition that all of their right and title to the property described in the bill is held under and by virtue of an assignment of a mining lease to Dallas Hopper from said Leander J. Fish, and said lease is attached and marked Exhibit "B," and the same is wholly void and illegal, because made in contravention of the Statutes of the United States.

III. The complainants' bill fails to state what the rules and regulations prescribed by the Secretary of the Interior for the conveyance of the land described in the plaintiffs' petition, of said Leander J. Fish, were, and what was done by said Leander J. Fish, or the purchaser of said land, in compliance with such rules, thereby failing to show on the face of the bill that any valid alienation of the land described in plaintiffs' petition was ever made.

IV. Because the Acts of Congress set out in the fourth paragraph of plaintiffs' petition do not empower the Secretary of the Interior to prescribe rules and regulations for a condit-onal alienation of allotted restricted lands, and the only alienation set forth in the plaintiffs' petition is a conveyance with a defeasant clause; which renders the same subject to be defeated by the performance of the condition in said deed set forth.

V. Because the bill of complaint fails to aver facts sufficient to show that the complainants have any interest, right or title in, or to, the use and benefit of the land described in plaintiffs' petition, or any right or title to said land, or that the plaintiff has any right

of any kind whatever to maintain any bill in equity to quiet the title to said land.

A. Scott Thompson, Hiram W. Currey, Attorneys for Defendants. A. Scott Thompson, Miami, Oklahoma. Hiram W. Currey, Webb City, Mo.

[File endorsement omitted.]

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF OKLAHOMA

[Title omitted]

DECREE—Filed September 12, 1916

This cause came on to be heard on this 12th day of September, 1916, upon the motion of the defendant to dismiss the said cause for failure of the plaintiffs to allege in their petition, facts sufficient to constitute a cause of action in equity; and was duly argued by counsel and thereupon, upon consideration thereof; It was ordered, adjudged and decreed that the defendant's said motion to dismiss the plaintiff's bill, be and the same is sustained and this cause dismissed. The plaintiffs, and each of them, duly excepted to the action of the Court in sustaining said motion to dismiss and said exception is duly allowed.

It is ordered that the plaintiffs be permitted to file a cost bond on appeal in the sum of Five Hundred ($500.00) Dollars conditioned as required by law, and plaintiffs in open court give notice of appeal in this cause.

Ralph E. Campbell, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR AND ORDER ALLOWING APPEAL—Filed September 20, 1916

To the Honorable Ralph E. Campbell, District Judge:

The above named plaintiffs, feeling themselves aggrieved by the order and decree of the Court made and entered in this cause on the 12" day of September, 1916, do hereby appeal from said decree and order to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record,

proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, in the State of Missouri.

And your petitioners further show to the Court that notice of this appeal was given in open court when said cause was decided, to-wit: On Tuesday, the 12" day of September, 1916, and the amount of the appeal bond for costs fixed at the sum of Five Hundred Dollars, conditioned as required by law, and your petitioners herewith present said bond for the approval of the Court.

Paul A. Ewert, 405-406 Frisco Building, Joplin, Missouri;
A. C. Towne, Miami, Oklahoma, Attorneys for Plaintiffs.

The above petition is granted and the appeal bond therewith submitted, hereby approved this 20th day of September, 1916.

Ralph E. Campbell, Judge of the United States District Court for the Eastern District of Oklahoma.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed September 20, 1916

Now on this — day of September, 1916, comes the plaintiffs by their attorneys, Paul A. Ewert and A. C. Towne, and say that the decree and order entered in the above cause on the 12" day of September, 1916, are erroneous and unjust to plaintiffs,

First. Because the Court erred in sustaining the motion of the defendants to dismiss plaintiffs' Bill.

Second. Because the Court erred in holding that the facts averred in the Bill of Complaint of plaintiffs herein, were insufficient to state and constitute a valid cause of action in equity against the defendant in the particulars set forth in defendant's Motion to Dismiss the Bill of Complaint filed herein.

Third. Because the Court erred in dismissing the Bill of Complaint of the plaintiffs herein and in the making and entering of the order and judgment made and entered in said matter on Tuesday the 12" day of September, 1916.

Wherefore: Plaintiffs pray that the said decree and order of the court be reversed and the District Court directed to deny the said motion and that further and proper proceedings may by said District Court be had in said cause.

Paul A. Ewert, 405-406 Frisco Building, Joplin, Missouri;
A. C. Towne, Miami, Oklahoma, Attorneys for Plaintiffs.

[File endorsement omitted.]

BOND ON APPEAL FOR $500—Approved and Filed September 20, 1916; omitted in printing

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING CERTAIN SIGNATURES TO BOND ON APPEAL, ETC.—Filed September 20, 1916

It is hereby stipulated, by and between the parties plaintiff and defendant in the above entitled action and by their respective counsel, that the defendant and his counsel hereby waives the signing of the Bond in Appeal in the above entitled action by the two principles, D. E. Beth and T. F. Phillips, consenting that the signature of the bond by the principal, W. P. McCullough and two approved sureties, shall be sufficient for the purpose of this appeal.

Dated this 18" day of September, 1916.

A. Scott Thompson and Hiram W. Currey, Attorneys for Defendant. Paul A. Ewert, A. C. Towne, Attorneys for Plaintiffs.

[File endorsement omitted.]

UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF APPEAL—Filed September 20, 1916

To R. P. Harrison, Clerk of the above Court:

You are hereby requested to make a transcript of the record to be filed in the Circuit Court of Appeals for the Eighth Circuit, pursuant to the petition for appeal granted and allowed in the above case by the Court, and include in such transcript of the record, the following and no other papers, to-wit:

Complainants' Amended Bill of Complaint, and Exhibits "A," "B," & "C" therein referred to, process and service thereof.
Defendant's Motion to Dismiss.
Order of the Court granting defendant's Motion.
Journal Entry of Judgment.
Petition for Appeal and the Order of the Court granting said appeal.
Assignment of Errors.
Bond in Appeal,
Præcipe for Transcript & Stipulation.

together with the minutes of said Court setting forth in full the filing of the said papers and all of the proceedings had thereon and therein.

Paul A. Ewert, 405-406 Frisco Building, Joplin, Missouri; A. C. Towne, Miami, Oklahoma, Attorneys for Appellants.

The undersigned, Attorneys for Defendant and Appellee herein, W. M. Smith, acknowledge receipt of a copy of the foregoing præcipe for Transcript, this 18 day of September, 1916, and join in the request of the Complainants and Appellants herein that the transcript of the record in said case be composed of the papers as in this præcipe set forth, and no others, and waive the issuance and service of citation in said case.

A. Scott Thompson and Hiram W. Currey, Attorneys for Defendant and Appellee.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

CLERK'S CERTIFICATE TO TRANSCRIPT—Filed September 26, 1916

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of so much of the record and proceedings in the case of W. P. McCullough, D. E. Beth and T. F. Phillips vs. W. M. Smith, No. 2305 Equity, as was ordered by præcipe of counsel filed herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Muskogee, this 25th day of September, A. D. 1916.

R. P. Harrison, Clerk, by D. F. Dickey, Deputy. (Seal U. S. Dist. Court, Eastern District of Oklahoma.)

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, DECEMBER TERM, 1916, MONDAY, DECEMBER 11, 1916

No. 4784

W. P. McCULLOUGH et al., Appellants,

vs.

W. M. SMITH

Appeal from the District Court of the United States for the Eastern District of Oklahoma

ORDER OF SUBMISSION

This cause having been called for hearing in its regular order, argument was commenced by Mr. Paul A. Ewert for appellants, continued by Mr. A. Scott Thompson for appellee and concluded by Mr. Paul A. Ewert for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from the said District Court and the briefs of counsel filed herein.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

OPINION—Filed June 20, 1917

SMITH, Circuit Judge, delivered the opinion of the Court.

According to the allegations of the bill the plaintiffs W. P. McCullough and T. F. Phillips, residents and citizens of Oklahoma, and D. E. Beth, a citizen and resident of Kansas, brought this suit in equity against W. M. Smith, a citizen and resident of Kansas. The bill substantially alleges that on March 2, 1895, Congress enacted 28 Stats. 876, 907, as follows:

"That the allotments of land made to the Quapaw Indians, in the Indian Territory, in pursuance of an act of the Quapaw National Council, approved March twenty-third, eighteen hundred and ninety-three, be and the same are hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior: Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said Act of the Quapaw National Council subject to revision, correction, and approval by the Secretary of the Interior. And the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith: Provided, that said allotments shall be inalienable for a period of twenty-five years from

and after the date of said patents." See Goodrum v. Buffalo, 162 Fed. 817.

There was patented to Leander J. Fish some two hundred and possibly two hundred and forty acres of land. On June 21, 1906, the Fifty-ninth Congress, 34 Stats. 325, 344, enacted the following:

"That Leander J. Fish, an allottee of two hundred acres of land in Section thirty-two, township twenty-nine, range twenty-three east, and of forty acres in section fourteen, township twenty-nine, range twenty-four east, in the Quapaw Reservation, under the provisions of the Act of March second, eighteen hundred and ninety-five (Twenty-eighth Statutes, page nine hundred and seven), and the Act of March third, nineteen hundred and one (Thirty-first Statutes, page ten hundred and fifty-eight), be, and he is hereby, authorized to alienate such portion of said land as he may see fit, not exceeding one hundred and twenty acres, under such rules and regulations as the Secretary of the Interior may prescribe, and any conveyance of such land made by said Fish shall be executed subject to the approval of the Secretary of the Interior."

Thereafter on July 14, 1906, Fish executed a mortgage deed to E. V. Kellett upon the east half of the northwest quarter and the southwest quarter of the northeast quarter, section thirty-two, township twenty-nine, range twenty-three, being one hundred and twenty acres, to secure a note for one thousand dollars due in three years with nine per cent interest. This mortgage deed was received by the Secretary of the Interior and approved July 20, 1906, although for ought that appears he had never prescribed any rules or regulations as contemplated in the last quoted Act of Congress. Thereafter Kellett assigned the said mortgage deed to the Alliance Trust Company of Dundee, Scotland. On June 20, 1918, the Alliance Trust Company acknowledged full payment and satisfaction of said mortgage and released the same and reconveyed the premises to Leander J. Fish, his heirs and assigns. On June 7, 1897, Congress passed an Act, 30 Stats. 62, 72:

"That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years, for farming or grazing purposes, or ten years for mining or business purposes."

On April 29, 1912, Leander J. Fish executed a lease of the same one hundred and twenty acres previously mortgaged to Kellett to Dallas Hopper for the term of ten years, "For the purpose of prospecting, mining, drilling, boring, or digging for oil, gas, asphaltum, lead, zinc, coal and copper and all and every other kind or kinds of valuable minerals, ore, fossil, or vegetable substance whatever, * * * if oil, mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals or other substances of value can be produced in paying quantities on such terms and con-

ditions as parties hereto have herein agreed upon after expiration of this lease. * * * The party of the second part hereby agrees to begin operations on the above described premises within ninety days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5¢ per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same."

Immediately after the execution of said lease said Dallas Hopper entered into possession of said premises under its terms and thereafter sold and conveyed all his rights under said lease to the plaintiffs and ever since the date of said lease said Hopper and his assignees, the plaintiffs, have remained in possession of the leased premises under said lease and have prospected and developed said lands and have sunk numerous test or drill holes upon said land and have sunk a shaft thereon and have improved and developed the same for mining purposes. The plaintiffs claim a leasehold interest in said premises under said mining lease and defendant claims an estate and interest adverse to the plaintiffs; that the claim of defendant is without any right whatever and the said defendant has no estate, title or interest whatever in said premises or any part thereof. The bill prays that the plaintiffs' title to their claimed leasehold interest be quieted; that it be decreed the defendant has no right whatever in said land and that he be debarred from asserting any claim adverse to the plaintiffs' and that defendant's claim under his mining lease be decreed void, and for general equitable relief. The defendant filed a motion to dismiss the bill because of want of equity and this motion was sustained, and the plaintiffs appeal.

It was not claimed in the motion to dismiss that the court lacked jurisdiction. For the first time it is urged in this court that the case should have been dismissed for that reason. It is probable that the jurisdiction could not be sustained upon the ground of diversity of citizenship as it is alleged that the plaintiff, D. E. Beth, is a citizen and resident of the State of Kansas and that the defendant, W. M. Smith, is a citizen and resident of the same State. But it will hereafter appear that this case "arises under the * * * laws of the United States" within the meaning of Judicial Code, Sec. 24, Sub. First, as amended, U. S. Compiled Statutes, 1916, § 991, and the objection to the jurisdiction can not be sustained.

Plaintiffs contend that the conveyance to Kellett was such an exhaustion of the power of alienation under the Act of the 59th Congress, 34 Stats. 344, that all control over alienation of the lands in question under the Act of the 53rd Congress, 28 Stats. 907, and under the Act of the 55th Congress, 30 Stats. 72, had ceased to exist when the lease was given by Fish and that it was given not under the power conferred by the 59th Congress, 34 Stats. 344, but absolved from any and all restrictions whatever. This involves a construction of the Act of Congress of May 2, 1890, 26 Stats. 81, 94, Sec 31, and the 14th Section of the Act of June 28, 1898, 30 Stats. 495, 500.

In 1884 there was adopted by the General Assembly of Arkansas, Mansfield's Digest of the Statutes of that State down to the close

of the General Assembly of 1883. By Section 31 of the Statute of May 2, 1890, 26 Stats. 81, 94, Congress extended certain of these general laws over Indian Territory. It is noticeable that of the one hundred and fifty-six chapters of Mansfield's Digest less than one-third in number are covered by this Act. It doubtless adopted the interpretation and construction put upon the statutes thus put in force in the Indian Territory by the Supreme Court of Arkansas prior to the adoption of the Act of Congress but not those decisions subsequent thereto.

In McCullan v. Pyeatt, 50 Fed. 686, this court held that although 26 Stats. 81, 94, put in force in Indian Territory the practice act of the State of Arkansas and although ever since 1840 the Supreme Court of Arkansas had held that a motion for a new trial in the trial court to correct all its alleged errors not apparent upon the face of the record was essential to review, this had no application in this court in appellate proceedings from the United States Court of Indian Territory.

In Eddy v. Lafayette, 49 Fed. 798, this court held that where a statute of Arkansas had been construed by the Supreme Court of that State so as to change the burden of proof as to negligence from plaintiff to defendant in an action against a railroad Company for killing stock that as the statute was not extended to Indian Territory by the Act of 26 Stats. 81, 94, the rule in the courts of Indian Territory had not been changed.

In Sanger v. Flow, 48 Fed. 152, and in Leak Glove Manufacturing Co. v. Needles, 69 Fed. 68, this court held that Congress was presumed to have put in force the laws of Arkansas enumerated in Indian Territory with the interpretation and construction put upon said laws prior to the Act of Congress by the Supreme Court of Arkansas.

In Noyes v. Neel, 100 Fed. 555, this court held that a construction by the Supreme Court of Arkansas put one of the statutes extended to Indian Territory after such extension was merely persuasive and did not preclude the courts of Indian Territory from expressing their independent opinion on the question of its interpretation and construction.

Enough has been said to show that Congress did not adopt for Indian Territory the interpretation and construction of Arkansas as to the common law. It simply extended the statutes enumerated to Indian Territory with the interpretation and construction placed upon them by the Supreme Court of the State of Arkansas before the date of the Act of Congress.

The 14th Section of the Act of June 28, 1898, 30 Stats. 495, 500, provides: "For the purposes of this section all of the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory;"

Without stopping to analyze what laws of Arkansas are within "the purposes of this section" as used in the statute of June 28, 1898, 30 Stats. 495, 500, it is sufficient to say that the decisions of the Supreme Court of Arkansas are not themselves laws within the meaning of this section. Swift v. Tyson, 16 Peters 1, 17.

As the Kellett mortgage was given July 14, 1906, before the actual

admission of Oklahoma to the Union, the effect of that instrument must be determined by the common law, modified, if at all, by the laws of Arkansas made applicable by the Act of Congress indicated to the Indian Territory and the interpretation and construction of such laws by the Supreme Court of Arkansas prior to May 2, 1890. Pyeatt v. Powell, 51 Fed. 551.

Among the laws of Arkansas put in force by the Act of May 2, 1890, was Chapter 110 of Mansfield's Digest. Section 4743 of this Chapter provides that a mortgage shall be a lien on the mortgaged property from the time of the filing of the mortgage. Section 4745 provides that upon payment of a mortgage the mortgagee, or his assignee, shall, upon request of the person making payment, acknowledge satisfaction upon the margin of the record of the mortgage. Section 4746 provides that if he fails to so acknowledge satisfaction as provided in the previous section within sixty days after being requested to do so he will be liable in damages. Section 4747 provides that such acknowledgment of satisfaction shall have the effect to release the mortgage and revest in the mortgagor or his legal representative all title to the mortgaged property. Section 4748 provides that if mortgaged property be redeemed by a payment to the officer such officer shall execute and acknowledge a certificate thereof and the same shall be recorded and have the same effect as the satisfaction on the margin of the record provided in Section 4747. Section 4759 provides that the property shall not at the first offering be sold for less than two-thirds of the appraised price and the second offering shall be made twelve months after the first, and that real property may be redeemed within one year from the date of sale.

There is not a word in the chapter or in Mansfield's Digest, so far as we have been able to ascertain, as to whether the whole estate, legal and equitable, vests under a mortgage in the mortgagee. Everything in Arkansas which passes upon how far the mortgagor alienates and how far the mortgagee acquires title is simply the construction of the common law by the Supreme Court of that State. Whittington v. Flint, 43 Ark. 504, 51 Am. R. 572; Fitzgerald v. Beebe, 7 Ark. 310; Kannady v. McCarron, 18 Ark. 166; Gilchrist v. Patterson 18 Ark. 575; Terry v. Rosell, 32 Ark. 478; Reynolds v. Canal Co., 30 Ark. 520.

In none of these cases does the Supreme Court of Arkansas refer to or cite as the basis of the opinion any of the statutes extended over Indian Territory by act of Congress. They are simply decisions of the Supreme Court of Arkansas as to what it deemed the common law to be and such constructions were never adopted by Congress for Indian Territory. We say this because it is true and not because it is essential to the determination of this case for the Supreme Court of Arkansas has decided numerous cases showing that a legal and equitable interest remains in the mortgagor in addition to those specified in Mansfield's Digest. In one of those cases, Terry v. Rosell, 32 Ark. 478, 488, Vaughan had mortgaged certain real estate to Terry and the court said: "The question now presents itself how the rights of the parties are affected by these conveyances? As between Vaughan and Terry, the legal estate is con-

sidered to be in Terry, as between him and Vaughan, and those claiming under Vaughan, but as to all others Vaughan must be considered as seized of the legal estate, and might well convey to another subject to the mortgage. Waterman's Eden., p. 93."

In Turner v. Watkins, 31 Ark. 429, it was held that when a mortgage or trust deed has a defeasance clause the legal title is with the grantee and the equity of redemption is in the grantor subject to sale on execution.

In Burr v. Robinson, 25 Ark. 277, it is held that the mortgagor of real property has the ownership or fee and his wife is entitled to dower therein, and the mortgagee of real property even after forfeiture has no interest in the property subject to execution, and the last proposition was sustained in Trapnall's Administratrix, v. The State Bank, 18 Ark. 53, and the cases cited therein.

In Van Ness v. Hyatt, 13 Peters 293, 297, it is said: "In the United States, different views have been taken on this question, in the courts of the several states. It is said, in 4 Kent's Com. 153-4, that courts of law have, by a gradual and almost insensible progress, adopted the views of a court of equity on the subject of mortgages, which are founded in justice, and accord with the true intent and inherent nature of the transaction; that except as against the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner;"

We hold that the question of the effect of the Kellett mortgage is to be determined by the common law of England and America as developed from time to time unaided by statute and that everywhere except as between the mortgagor and the mortgagee the mortgagor while in possession and before foreclosure is regarded as the real owner, and we also hold that even if the decisions of Arkansas were controlling the Kellett mortgage was not a complete alienation of the land; that the confirmation by the Secretary of the Interior of a partial alienation would not cause him to lose authority over the complete alienation. Of course if this mortgage had gone to foreclosure it would have ultimately resulted in a complete alienation and in this contingent way the Secretary of the Interior approved a complete alienation if it took place, but it did not take place and Fish had no more authority to execute a lease by reason of the execution and approval of this mortgage than he would have had if it had never been executed.

We turn now to the question of the validity of the lease now owned by the plaintiff but originally executed to Dallas Hopper.

The defendant contends that it is invalid for two reasons. First, the lease provides that if oil, mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk the privilege of operating shall continue so long as oil, minerals, or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease; that the Act of 55 Congress, 30 Stats. 72. only authorized leases for mining purposes for a term not exceeding ten years whereas the clause above quoted

made the lease in effect in perpetuity. Second, that the lease contained the following provision:

"The party of the second part hereby agrees to begin operations on the above described premises within ninety days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5¢ per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate and hold the same."

the specific contention under this head being that the lease lacks mutuality and is in effect a unilateral contract. Defendant cites in support of this contention Superior Oil & Gas Co. v. Mehlin, (Okla.) 108 Pac. 545; Huggins, et al. v. Daley, 99 Fed. 606, and Reese v. Zinn, 103 Fed. 97.

These questions will be passed upon in their order.

By the Act of June 7, 1897, 30 Stats. 62, 72, the Indian in this case was authorized to lease this land "for a term not exceeding * * * ten years for mining or business purposes." The Hopper lease granted the land for purposes of prospecting, mining, drilling, boring or digging for oil, gas, asphaltum, lead, zinc, coal and copper and all and every other kind or kinds of valuable minerals, ore, fossils and vegetable substance whatever, for ten years, with the additional provision that if oil, mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk the privilege of operating shall continue so long as oil, minerals or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease.

The first question is whether this last provision made the lease in effect in perpetuity and whether it made the lease void from the beginning or valid for ten years and void thereafter.

Turning first and primarily to the Federal authorities upon the subject, in United States v. Bradley, 10 Peters 341, a suit was brought by the United States on a joint and several bond and it was claimed the bond contained conditions not authorized by statute. The court said, page 360:

"That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded on illegality, but not malum in se, is a doctrine well founded in the common law, and has been recognized from a very early period."

After a review of a number of authorities, English and American, it continued, page 363:

"Upon the whole, upon this point, we are of opinion, that there is no solid distinction, in cases of this sort, between bonds, and other deeds containing conditions, covenants or grants, not malum in se, but illegal at the common law, and those containing conditions, covenants or grants, illegal by the express prohibition of statutes. In each

case, the bonds or other deeds are void as to such conditions, covenants or grants, which are illegal; and are good as to all others, which are legal and un-ceptionable in their purport. The only exception is, when the statute has not confined its prohibitions to the illegal conditions, covenants or grants; but has expressly, or by necessary implication, avoided the whole instrument, to all intents and purposes."

In Gelpcke v. City of Dubuque, 1 Wall. 175, 222, the Supreme Court said: "The counsel of the plaintiffs in error have submitted no argument in regard to the two first causes assigned for the demurrer. We have not therefore considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of malum in se is, that the bad parts do not affect the good. The valid may be enforced."

In United States v. Hodson, 10 Wall. 395, 408, it is said: "It is a settled principle of law that where a bond contains conditions, some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced."

In Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64, where the Oregon Steam Navigation Co. sold a steamer to one Winsor with a stipulation that she should not be run on the waters of the State of California for the period of ten years from the first day of May, 1867, and this was a reasonable stipulation in restraint of trade for seven years but not for ten, the court held that the contract was separable and that an action would lie for liquidated damages for the violation of the contract within the seven years.

In Burnhisel v. Firman, 22 Wall. 170, where notes had been given in renewal of old notes computing the interest at the rate fixed in the old notes which was in excess of the customary rate and it had been held that such higher rate was valid until the maturity of the notes and thereafter the customary or statutory rate governed, it was held that in suits upon the renewal notes independently of the bankrupt act and of any statute making such security void in toto as usurious they were valid securities for the amount which would be due on a calculation properly made. They were bad only for the excess above proper interest.

In McCullough v. Virginia, 172 U. S. 102, the Supreme Court, after citing numerous state authorities and the authorities from that court heretofore cited, said:

"We see no reason to change the views heretofore and often expressed by this court, and reiterate, as said in 135 U. S. 668, 'this question, therefore, must be considered as foreclosed, and no longer open for consideration.'"

Turning now to the decisions of this court, in Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, the city of Arkansas City in the State of Kansas had granted to the Interstate

Gas Company the franchise to construct and operate waterworks in the city exclusive in character and stipulated for the payment of specific sums as hydrant rentals. The provision granting the exclusive franchise was void but this court held that the city was liable for the water rentals under the contract.

In Lincoln Savings Bank & Safe Deposit Co. v. Allen, 82 Fed. 148, this court held that where the plaintiff in error had a claim for $2,700.00 against one Sears secured by collateral and it contracted that upon payment to it of $1,500.00 and the transfer to it absolutely of two of the collateral notes it would release all claims against Sears and surrender the balance of the collateral notes, that while the agreement to release Sears was illegal the contract to surrender the remaining collateral notes was valid and could be enforced. See Kauffman v. Raeder, 108 Fed. 171, 179.

In McPhee & McGinnity Co. v. Union Pacific R. Co., et al., 158 Fed. 5, the city of Denver by ordinance had granted to the Union Pacific Railway Co., its successors and assigns a license to construct a railroad track on Blake Street in the city of Denver. The city council had no power to grant anything but a revocable license and it was insisted that every license must be personal and unassignable and as the license in question ran not only to the railroad company but to its successors and assigns it was unauthorized and void. This court held that the city council had power to grant this license to the Union Pacific Railroad Company and if without authority it conferred it upon its successors and assigns the result would be that the latter portion of the grant would fail and the former stand.

In Jenson v. Toltec Ranch Co., 178 Fed. 86, it is held that it is no defense to an action upon a contract executed by the promisee that a divisible part of its consideration was without the powers of the promisor corporation if the other part was valuable, legal, and within them, for the promisee may waive the part without the powers of the promisor and recover upon the consideration within its powers.

Passing now from the decisions of the Supreme and of this court to decisions of other Federal Courts, in Western Union Telegraph Co. v. Kansas Pac. Ry. Co., 4 Fed. 284, the principle that a provision in a contract which is illegal does not invalidate the entire contract is announced.

In re T. H. Bunch Co., 180 Fed. 519, the opinion of Trieber, District Judge, quite clearly makes the distinction heretofore pointed out.

In McBride v. Farrington, 149 Fed. 114, 115, the court said: "The leases in question are for the mining of coal, iron, petroleum, oil, gas, asphaltum and other minerals. If void as to the other minerals, they are apparently valid as to the coal. For what length of time they purported to run is not shown by the record. If for an indefinite time, the terms of the act would no doubt restrict them to ten years. It is difficult to see how such leases, which apparen-ly conveyed some rights for a restricted period, can be held to be so utterly valueless as to constitute an entire failure of consideration."

And in the dissenting opinion it is said: "It is well settled that

when a conveyance or contract contains conditions, some of which are legal and others illegal, and they are severable and separable as respects consideration and performance, the latter may be disregarded and the former enforced."

The following Federal cases sustain the same doctrine: Van Ness v. Hyatt, 5 Cranch, C. C. 127, 28 Fed. Cas. 1044; Warner v. Howell, 3 Wash. C. C. 12, 29 Fed. Cas. 257; United States v. Humason, 8 Fed. 71, 79; United States v. Jones, 77 Fed. 717, 721; Mathews Slate Co. v. New Empire Slate Co., 122 Fed. 972; In re Johnson, 224 Fed. 180, 186; Northern Pac. R. Co. v. United States, 15 Ct. Cls. 428.

Passing now from the Federal cases, a very strong case on the subject, reviewing many cases both English and American, is Osgood v. Central Vermont Railroad Co., 77 Vt. 334, 70 L. R. A. 930, 933, and see Shaw v. Carpenter, 54 Vt. 155, 41 Am. Rep. 837.

The following cases quite fully sustain the proposition that the clause in the lease in question was void but did not affect the balance of the lease: Hart v. Hart, 22 Barbour, 606; Robertson v. Hays, 83 Ala. 290, 3 So. 674; Erie Railway Co. v. Union Locomotive & Exp. Co., 35 N. J. L. 240; Glaze v. Duson, 40 La. Ann. 692, 4 So. 861; Porter v. Fisher (Cal.) 34 Pac. 700; Mack v. Jastro, 126 Cal. 130, 58 Pac. 372; Hedges v. Frink, (Cal.) 163 Pac. 884; Corcoran v. Lehigh & Franklin Coal Co., 138 Ill. 390, 28 N. E. 759; Stewart v. Pierce, 116 Iowa 733, 89 N. W. 234; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817; Rosenblatt v. Townsley, 73 Mo. 536; Morris v. Way, 16 Ohio 469; Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 Pac. 803.

Other cases in point could be cited but we have called attention to enough to fully demonstrate as we think that the clause in the lease in question was invalid but it did not serve to invalidate the lease as a whole.

The rule is that when a part of a divisible grant or contract is ultra vires or illegal, but not malum in se, and the remainder is lawful, the latter may be sustained and enforced unless it appears from a consideration of the whole grant or contract that it would not have been made without the part which is ultra vires or illegal. Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 280; McPhee & McGinnity Co. v. Union Pac. Ry. Co., 158 Fed. 5, 19.

This lease is divisible and it does not appear that it would not have been made without the clause assailed.

We turn now to the second clause in the lease which it is claimed invalidated it.

This question does not seem to have been presented to the court below at all. It was never presented in this court in the original printed brief. It was first suggested in the oral argument at the bar. Were it suggested in this case to reverse the judgment of the court below we should not consider it at all but it is suggested as a ground upon which the action of the court below should be sustained and we have concluded that it was best to consider it briefly.

The lease in question expressly recites that it is in consideration of one dollar in hand paid by the lessee to the lessor and other considerations.

It has been held not only that one dollar is a valuable consideration but that neither party to such a contract can show that the same was not paid. Stannard v. Aurora E. & C. Ry. Co., 220 Ill. 469, 77 N. E. 254; Lindley v. Raydure, 239 Fed. 928, 938.

In Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912, B. 360, 363, the lease was not only for oil and gas but "for the purpose of prospecting, mining, drilling, boring or digging for oil, gas, asphaltum, lead, zinc, coal and copper, and all and every other kinds of valuable minerals, ore, fossils or vegetable substances whatever." The particular clause here in question provides that it shall run "so long as they [the party of the first part] and their assigns desire to operate or hold the same." This we think means within the period of the lease which we have held was for ten years. Under the holding just made with reference to the other clause if it extended beyond ten years it would, in that respect, be void but the balance of the lease would stand.

We have seen that the petition expressly alleges that the lessee and his assigns, including these plaintiffs, have remained in continuous possession of the said premises; that under and pursuant to the terms of said lease they have prospected and developed said land and sunk numerous test or drill holes upon said land and have sunk a shaft thereon and improved and developed the same for mining purposes.

It must be borne in mind that the lease was for the purpose of mining lead, zinc, coal and copper as well as for the purpose of boring for oil and gas. The rules therefore as to oil and gas, which are fugacious, Priddy v. Thompson, 123 C. C. A. 277, 204 Fed. 955, Kemmerer v. Midland Oil & Drilling Co., 144 C. C. A. 154, 229 Fed. 872, do not wholly control the construction of the contract.

The lease gave not only the right to mine for lead, zinc, coal and copper, but it gave the right, "To use as much of the surface of said land and so much of the building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations, also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery, pipe lines upon said premises for successfully carrying on the business of boring, prospecting, mining and prosecuting the object of this indenture, with the right to remove or sell and remove all of said buildings, refineries, machinery and pipe lines, at any time or at the expiration of this lease."

The rule therefore that the lessee who has the right to oil and gas acquires only an incorporeal hereditament is not applicable to this lease as applied to other subjects of the lease. Allegheny Oil Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764; Lindley v. Raydure, 239 Fed. 928.

The question whether the clause now under consideration is unfair or inequitable must be determined upon the final hearing upon the issues between the parties. Suffice it to say it does not appear that

there is anything in the clause in question to invalidate the lease. Guffery v. Smith, 237 U. S. 101, 116, 117; Brewster v. Lanyon Zinc Co., 140 Fed. 801.

The cases cited by appellee upon this question are not in point. In Superior Oil & Gas Co. v. Mehlin, — Okla. —, 108 Pac. 545, the defendant made not a lease but a contract to make a lease to plaintiff of certain lands for oil and gas. The action was to reform and secure specific performance of the lease. The contract sued on was wholly executory. In this case the bill shows the lease in suit was in part executed and is not a suit for specific performance but is in the nature of an action to quiet title. The holding in that case was that specific performance will not lie unless the agreement is certain, fair and just in all its parts and such an action may, where showing that the contract is unfair, unjust and against good conscience, well justify the court in refusing such decree although the contract had it been executed might offer no sufficient ground for cancellation. It was further held that an executory contract which under its terms leaves it optional with one party whether or not he will proceed with the contemplated enterprise makes the same likewise optional with the other and specific performance will not be decreed. It is manifest that case does not sustain the contention of the appellee.

In Huggins v. Daley, 40 C. C. A. 12, 99 Fed. 606, it is held that where an oil and gas lease provides for the compensation of the lessor solely by a share of the product and provides for the sinking of a well within a specified time under a penalty as distinguished from liquidated damages and the lessee makes no attempt to comply with the terms of his contract and manifests no intention to comply therewith the lease becomes forfeitable at the expiration of the specified time. In this case the defendant had filed no answer and did not allege that the lease had been forfeited. This case under the present state of the pleadings has no application.

The same is true of Reese v. Zinn, 103 Fed. 97. It was an action to forfeit a lease upon the ground of abandonment and did hold that the lease lacked mutuality because it authorized the lessee to terminate the contract at will.

The decree of the District Court is reversed and the cause is ordered remanded to the end that the court may overrule the motion to dismiss the petition and permit the defendant, if so advised, to answer and proceed to trial.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

Appeal from the District Court of the United States for the Eastern District of Oklahoma

DECREE

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by Counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that W. P. McCullough, D. E. Beth and T. F. Phillips have and recover against W. M. Smith the sum of Eighty-one and 05/100 Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to overrule the motion to dismiss the petition and permit the defendant, if so advised, to answer and proceed to trial.

June 20, 1917.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION OF APPELLEE FOR REHEARING—Filed August 16, 1917

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

The appellee, W. M. Smith, respectfully prays Your Honors to grant to your petitioner a re-hearing and re-argument on the judgment, decision and opinion in the above cause, rendered and filed in said cause on the 20th day of June, A. D. 1917, upon the grounds and for the reasons following, to-wit:

(1) Because the judgment, opinion and decision of the court fails to give consideration to the fact that the grantor, in the lease under consideration, is a Quapaw Indian, and that the lease was executed under a particular grant of power to lease for mining purposes granted by the Acts of Congress for the special benefit of the Indian, and overlooked and failed to consider the policy of the Government of the United States toward the Indian, and overlooked the interpretation and construction placed upon such Leasing Statutes in the case of United States v. Noble, 237 U. S. 74, and that such Indian was expressly prohibited from making any contracts affecting his land by the Acts of Congress, modified only by the power to lease, as specified in the said Leasing Act.

(2) Because the said judgment, decision and opinion assumes that the lease, under which the appellants claim, was valid for ten years and void as to the excess. The said lease being, by its terms, a lease in perpetuity, and, therefore, void, as against the restraint upon alienation imposed by Act of Congress March 2, 1895, and in excess of the power conferred by Act of Congress June 7, 1897, which question was raised by appellee in his brief, and not considered or discussed in said judgment, decision and opinion.

(3) Because the said judgment, opinion and decision does not consider the policy of the government of the United States towards its Indian wards, as expressed in United States v. Noble, 237 U. S. 74; United States v. Allen, 179 Federal, 13, and Heckman v. United States, 224 U. S. 413, and other decisions of the Federal Courts, asserting and defining the policy of the government of the United States towards Indian wards, and holding that such policy should be the controlling consideration in determining all contracts made between an Indian and white man, affecting the restricted lands of the Indians.

(4) Because said judgment, opinion and decision assumes that in order to avoid appellant's lease, as a violation of the leasing statute and the granted power to the Indian to make leases, it devolves upon the appellee to prove aliunde that the lease would not have been executed by the Indian but for the perpetual, reciprocal grants and covenants expressed in the lease, whereas the grant of the mining privileges on the land, as expressed in the lease, runs from the lessor to the lessee in perpetuity and the covenants of the lessee to prospect, mine and pay royalty run in perpetuity from the lessee to the lessor. The grant and the real consideration for the grant, as expressed in the lease, exists in perpetuity, and if the lease was one between parties sui juris it would be a valid and binding lease in perpetuity.

The only condition to the grant in perpetuity being that ore shall be found in paying quantities, and if ore is so found, the grant, by virtue of the language in which it is expressed, becomes effective as a grant in perpetuity. In any mining lease with covenants to prospect and mine, failure to find ore exhausts the lease and ends the term. Further, if the lease is not, by its terms, within the granted power to make a lease, it is illegal without regard to what consideration moved the Indian to execute the same, the Indian being wholly incompetent and incapable for the purpose of a lease, of determining whether he would or would not have granted the lease but for said stipulation.

(5) Because the holding of the court that the perpetual clause in the lease executed by the Indian was severable from the grant of the right to mine and carry on mining operations, so that the lease may be held to be valid for the term of ten years and void as to the term thereafter, violates the very terms of the lease, in that the provision therein, that "if oil and mineral or any other substances of value are found in paying quantities * * * in any shaft sunk,

the privilege of operating shall continue so long as * * * substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease," conditions the vesting of any estate or interest in the ore mined, and also conditions the obligations to pay royalty on ore mined upon the finding of ore "in paying quantities" upon the lease, so that, the very language which grants the right to take ore at any time grants such right in perpetuity.

(6) Because said judgment, decision and opinion applied to the case, as presented by the record, the law of real property, as the same applies to leases between parties sui juris. It does not consider or discuss the law as applied to the case under the Acts of Congress March 2, 1895, and June 7, 1897, or the policy of the government towards the Indian, or the fact that the Indian is non sui juris.

(7) Because the said judgment, decision and opinion, upholding the one dollar consideration paid for delay, and the provision that the lessee may pay during the term five cents per acre "in lieu of work," violates the Acts of Congress March 2, 1895, and June 7, 1897, in that it permits the Indian to alienate his land for ten years for the absurd consideration of one dollar for ninety days delay, in commencing work, and the "barley corn" rental of five cents per acre yearly, aggregating six dollars yearly, and sixty dollars for the ten year term, "in lieu of work." Thus enabling the white lessee to hold the mining rights on the Indian's land for ten years for exploitation and speculation and preventing the Indian from enjoying the benefit of mining operations upon the land for ten years.

(8) Because the said judgment, decision and opinion in effect, holds that the provision of the lease for the payment of "5¢ per acre yearly for each and every acre contained in this lease 'in lieu of said work,' as long as they or their assigns desire to operate or hold the same," is a valid provision and enables the lessee to hold the Indian's land for the ten year term by paying the stipulated price, "in lieu of work."

Whereas the only power vested in the Indian, against the restrictions imposed by Act of March 2, 1895, is to make a lease for mining purposes. It was not the purpose of the Act of June 7, 1897, to authorize the execution of a lease for money rentals, of five cents per acre yearly, or any other sum, by which the lessee could hold the land of the Indian for exploitation, speculation, or for any other purpose. This provision renders the lease absolutely void, because by its terms it is in violation of the policy of the government toward the Indian—in violation of the purpose of the act—and this question is not considered in the said judgment, decision and opinion.

(9) Because said judgment, opinion and decision assumes that the lessee under the lease in question obtained an estate or interest in the mineral in place, notwithstanding the fact that mineral in place is land, and under the Act of Congress, March 2, 1895, afore-

said, the Indian has no power to pass title to his land, and in support of the declaration the court cites Allegheny Oil Co. v. Snyder, 106 Fed. 764, and Lindley v. Raydure, 239 Fed. 928, both of which cases were between parties sui juris, who were not restricted in their right to contract, and had absolute dominion over and full power of disposition and alienation of their lands, which decisions do not apply to an Indian in leasing his land under the Act of June 7, 1897.

(10) Because said judgment, decision and opinion assumes that the questions arising under said provision in the lease, the one dollar consideration, and the payment of five cents per acre yearly during the term of the lease, is one for consideration by the court on final hearing as to whether the said provision is unfair or inequitable, and does not consider the said lease as executed under a power by an Indian non sui juris, and applies to the lease the rules of law controlling contracts between parties sui juris.

(11) Because said judgment, decision and opinion assumes that the alleged possession by the lessee in some way ratifies the said lease and renders a void instrument valid, whereas a void lease of itself conveys no title, and before a plaintiff can quiet his title he must have some kind of a valid title to be quieted. If the lease of the plaintiff, appellants, is void and their alleged possession has not been disturbed, it may be that it will be necessary in the future for the appellee here to establish his title as against the claim of the appellants.

Possession under a void lease would not authorize the court to quiet the title of the lessee and would not entitle the lessee to maintain any action for that purpose against his lessor or any grantee of his lessor.

We, Arthur S. Thompson and Hiram W. Currey, attorneys, and Henry E. Asp, of counsel, hereby certify that we are the attorneys and counsel for Wesley M. Smith, the appellee, above named, and that in our opinion the petition of said Wesley M. Smith for rehearing interposed in the above entitled case, and each and every proposition therein set forth, are well-founded on point of law and is proper to be filed and considered by this court in the above entitled cause.

Arthur S. Thompson, Miami, Oklahoma; Hiram W. Currey, Joplin, Missouri, Attorneys for the Appellee and Petitioner. Henry E. Asp, Oklahoma City, Oklahoma; Leslie J. Lyons, Kansas City, Missouri, of Counsel.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

ORDER DENYING PETITION FOR REHEARING

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellee.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

September 10, 1917.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

MEMORANDUM OF CLERK

The mandate of the United States Circuit Court of Appeals in this cause No. 4784, called for by the præcipe for transcript on the appeal to the Supreme Court of the United States in cause No. 5892, is not included herein for the reason that the original thereof was issued and transmitted to the District Court of the United States for the Eastern District of Oklahoma on October 16, 1917.

Caption in C. C. A. omitted

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE R. L. WILLIAMS, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

W. P. McCULLOUGH, D. E. BETH and T. P. PHILLIPS, ***Plaintiffs,***

Equity ***vs.*** **No. 2305.**

**W. M. SMITH, - - -

resident of the State of Kansas; that the defendant W. M. Smith is a citizen and resident of the State of Kansas residing at Baxter Springs in the State of Kansas; that the value of the subject-matter in controversy herein is in excess of the sum of Three Thousand Dollars ($3,000), exclusive of costs and interest; that the value of the right to possession of the mining lands, the subject of this suit, under and pursuant to the terms and conditions of the mining lease under which complainants claim, is in excess of the sum of Three Thousand Dollars ($3,000), exclusive of costs and interest.

II.

That under and pursuant to that portion of the Act of Congress of the United States approved March 2, 1895, being a part of the Indian Appropriation Act for the year 1895 (28 Stats., page 927), providing for the allotment in severalty of certain lands theretofore set apart for the use of the Quapaw Tribe of Indians, and the individual members thereof, there was allotted to Leander J. Fish the following described lands (and other lands), to-wit:

> The East One-half of the Northwest One-fourth, and the Southeast One-fourth of the Northeast One-fourth of Section Thirty-two, Township Twenty-nine, Range Twenty-three East of the Indian Meridian, Ottawa County, Oklahoma, containing 120 acres.

III.

That thereafter, to-wit: on the 26th day of September, 1896, the United States of America, pursuant to and under the terms and conditions contained in the said Act of Congress, in due form issued to and in favor of the said Leander J. Fish a certain allotment patent in and to the hereinbefore described lands, said lands being located in what is now Ottawa County, Oklahoma, in the Eastern Judicial District of Oklahoma.

IV.

That thereafter the Congress of the United States passed a certain act, which was duly approved and became a law on June 21, 1906 (34 Stats. 325-344; Kappler's Indian Laws and Treaties, Vol. 3, page 211), as follows, to-wit:

> That Leander J. Fish, an allottee of two hundred acres of land in Section Thirty-two, Township Twenty-nine, Range Twenty-three, east, and of forty acres in section fourteen, Township Twenty-nine, Range Twenty-four east, in the Quapaw Reservation, under the provisions of the Act of March second, eighteen hundred and ninety-

five (Twenty-eighth Statutes, page nine hundred and seven), and the Act of March third, nineteen hundred and one (Thirty-first Statutes, page ten-hundred and fifty-eight), be, and he is hereby authorized to alienate such portion of said land as he may see fit, not exceeding one hundred and twenty acres, under such rules and regulations as the Secretary of the Interior may prescribe, and any conveyance of such land made by said Fish shall be executed subject to the approval of the Secretary of the Interior.

V.

That thereafter, to-wit: on the 14th day of July, 1906, the said Leander J. Fish availed himself of the provisions of the said Act of Congress, and by and with the consent and approval of the Secretary of the Interior did alienate a portion of his said land, under and pursuant to the terms of the said act, described as follows, to-wit:

> The East one-half of the Northwest one-fourth, and the Southeast one-fourth of the Northeast one-fourth of Section Thirty-two, Township Twenty-nine, Range Twenty-three East of the Indian Meridian, Ottawa County, Oklahoma, containing 120 acres,

and did make, execute and deliver to one E. V. Kellett of Seneca, Missouri, a certain deed to the said hereinbefore described land, with a defeasance clause thereunto attached, and said deed was thereafter, to-wit: on the 18th day of July, 1906, presented to the Department of the Interior of the United States and on said date recommended for approval by the Commissioner of Indian Affairs by indorsement on the said deed, as follows, to-wit:

> "The within alienation is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.
>
> C. F. Larrabee, Acting Commissioner."

That thereafter, to-wit: on the 20th day of July, 1906, the said alienation was approved by the Honorable Secretary of the Interior of the United States by indorsement on the back of said instrument, as follows, to-wit:

> "Department of the Interior, Received July 20th, 1906. Enc. No. 1, 12746, Indian Territory Division. Department of the Interior July 20th, 1906. The within alienation is hereby approved.
>
> Thos. Ryan, Acting Secretary."

That thereafter this instrument was filed for record in the

office of L. D. Einsel, Deputy Clerk and Ex Officio Recorder for the recording district of the Northern District of Indian Territory, then located at Miami, Oklahoma, and there recorded on the 28th day of July, 1906, in Book F on pages 63-64 of said records, a copy of which said deed with defeasance clause attached, with the approval of the said alienation endorsed thereon by the Secretary of the Interior of the United States, is hereunto attached, marked Exhibit "A" and made a part of this Amended Bill of Complaint.

VI.

That thereafter, to-wit: On the 4th day of August, 1906, the said E. V. Kellett duly and lawfully assigned the said instrument of alienation, to-wit: Exhibit "B," to the Alliance Trust Company, Limited, of Dundee, Scotland, which said assignment was thereafter, to-wit: On the 15" day of August, 1906, filed for record in the office of L. D. Einsel, Deputy Clerk and Ex Officio Recorder for the Northern Recording District of Indian Territory, then located at Miami, Oklahoma, and there recorded on the records of said office in Book .... on page ...., thereof; that thereafter, to-wit: On the 20th day of June, 1908, the said Alliance Trust Company, Limited, of Dundee, Scotland, in due form duly and lawfully re-conveyed the said premises to the said Leander J. Fish by a deed of release and conveyance, a copy of which said deed of release and conveyance is hereunto attached, marked Exhibit "B" and made a part of this Amended Bill of Complaint.

That thereafter, to-wit: On the 24th day of July, 1908, the said deed of release and conveyance was duly filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book .... on page .... of the records of said office.

VII.

That thereafter, and on numerous occasions, the Honorable Secretary of the Interior of the United States, by his subsequent official acts with respect to said lands, ratified and confirmed said alienation and recognized it as an alienation, under and pursuant to the provisions of the Act of Congress of June 21, 1906, *supra.*

VIII.

That thereafter, to-wit: On the 29th day of April, 1913, the said Leander J. Fish made, executed and delivered to one Dallas Hopper of Miami, Oklahoma, a certain mining lease, wherein and whereby he leased unto the said Dallas Hopper

for mining purposes the hereinbefore described lands, a copy of which lease is hereunto attached, marked Exhibit "C," and made a part of this Amended Bill of Complaint; that thereafter, to-wit: On the 29th day of April, 1912, the said mining lease so made, executed and delivered, was by the said Dallas Hopper filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book 31 on page 167 of the records in said office.

IX.

That thereafter, and prior to the beginning of this action, the said Dallas Hopper assigned all his right, title and interest in and to said mining lease to these plaintiffs, and they are now the owners and holders of said lease and in possession of the said hereinbefore described land, under and pursuant to the terms and conditions thereof; that immediately upon the execution and delivery of the said mining lease, Exhibit "C," by the said Leander J. Fisk to the said Dallas Hopper, the said Dallas Hopper entered into possession of the said premises under and pursuant to the terms and conditions contained in said mining lease, and ever since said time he and his assignees and now these plaintiffs, have remained in continuous possession of the said premises; that under and pursuant to the terms of said lease they have prospected and developed said land and have sunk numerous test or drill holes upon said land, and have sunk a shaft thereon and improved and developed the same for mining purposes.

X.

That these plaintiffs claim a leasehold interest in and to said premises under the said mining lease, Exhibit "C," and the defendant claims an estate or interest therein adverse to these plaintiffs; that the claim for the defendant is without any right whatever, and that the said defendant has no estate, right, title or interest whatsoever in said land or premises or any part thereof.

Wherefore: Plaintiffs pray that the defendant be required to make due answer to Plaintiffs' Amended Bill of Complaint herein (but not under oath, answer under oath being hereby expressly waived); that he be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by decree of this court; that by the said decree it be declared and adjudged that the defendant has no estate or interest whatsoever in and to said land and premises, and that the title of the plaintiff is good and valid, under their said mining lease, Exhibit "C"; that the defendant be forever adjudged and debarred from asserting

any claim in and to said land and premises adverse to the plaintiffs', and that the said mining lease or instrument, under which the said defendant claims an interest in said lands, be declared null and void and cancelled of record, and for such other and further relief as to the Honorable Court shall seem meet and agreeable in equity and good conscience, together with the costs and disbursements of this action.

PAUL A. EWERT,
Attorney for Plaintiffs,
405-406 Frisco Building, Joplin, Missouri.

A. C. TOWNE,
Attorney for Plaintiffs,
Miami, Oklahoma.

EXHIBIT "A."

MORTGAGE.

Leander J. Fish to E. V. Kellett.

Know All Men by These Presents, That I, Leander J. Fish, a single man, for and in consideration of the sum of one dollar ($1.00) to me in hand paid, and the premises hereinafter set forth, do hereby grant bargain and sell unto E. V. Kellett, of Seneca, Mo., and unto his heirs, and assigns forever, the following property: The northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section 32, Township 29, North of Range 23, East, being in all one hundred and twenty acres (120) more or less, situated in the Quapaw Reservation, Indian Territory being that part of my allotment of 240 acres of land made under the act of February 3rd, 1897, and February 19th, 1903, which I am authorized to alienate under the provisions of the act of Congress approved June 21st, 1906.

And I hereby covenant with the said E. V. Kellett, that I will forever warrant and defend the title to said property against all lawful claims. The sale is on the condition that whereas Leander J. Fish, is justly indebted to the said E. V. Kellett, in the sum of One Thousand Dollars ($1,000) evidenced by a certain promissory note dated July 12th, 1906, which is in words and figures following, $1,000.00 Washington, D. C., July 12th, 1906. Three years after date I promise to pay to the order of E. V. Kellett, One Thousand Dollars ($1,000) at the First National Bank of Seneca, Mo., value received with interest at 9 per cent per annum payable semi-annually until paid. (Signed) Leander J. Fish.

Now, if I shall pay said moneys at the time and in the manner aforesaid then the above conveyance shall be null and void, and in case of non-payment then the said grantee or assignee shall have the power to sell said property at public sale to the highest bidder for cash, at Wyandotte in the Quapaw Agency in the Indian Territory, Public notice of the time and place of said sale having first been given ten days by advertising in some newspaper published in said Territory by at least two insertions or by notices posted in public places in the Quapaw Reservation, at which sale the said grantee or his assignees may bid and purchase as any third person might do. I hereby authorize the grantee or assignee to convey said property to any one purchasing at said sale, and to convey an absolute title thereto, and the recitals of his deed of conveyance shall be taken as prima facie true, and the proceeds of said sale shall be applied, first, to the payment of all costs and expenses attending said sale. Second, to the payment of said debt and interest, and the remainder if any shall be paid to the said grantor.

Witness my hand and seal on this 14th day of July, 1906. (Witnesses) J. D. Yoakley. Leander J. Fish.

District of Columbia, City of Washington—ss.

Be it remembered, that on this day came before me, the undersigned Notary Public within and for the District aforesaid, duly commissioned and acting. Leander J. Fish, to me well known as the grantor in the foregoing deed, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and that he was and is a single man, the erasure of 24 and the insertion of 23, was made before the execution of the said mortgage deed.

Witness my hand and seal as such Notary Public on this 14th day of July, 1906. (Seal) J. D. Yoakley, Notary Public. D. C.

District of Columbia--ss.

I, John R. Young, Clerk of the Supreme Court of record having a [] do hereby certify that J. D. Yoakley, before whom the annexed instrument in writing was executed and whose name is subscribed thereto, was at the time of signing the same a Notary Public in and for said District duly commissioned and sworn and authorized by the laws of the said District to take acknowledgment and proof of deeds and other instruments in writing, to be recorded in said District, and to administer oaths; and that I am well acquainted with the hand writing of the said Notary Public and verily believe that the signature to said instrument is genuine.

In witness whereof, I have hereunto subscribed my hand and affixed the seal of said court at the City of Washington, D. C., the 18th day of July, A. D. 1906.

(Seal) John B. Young, Clerk.

59326, Indian Office, Incl. No. 1, 1906. 62096. Indian Office Incl. No. 2, 1906. Department of the Interior, Office of Indian Affairs July 18th, 1906. The within alienation is respectfully submitted to the Secretary of the Interior, with the recommendation that it be approved. C. F. Larrabee, Acting Commissioner.

Department of the Interior, Received July 20th, 1906. Enc. No. 12746. Indian Territory Division. Department of the Interior July 20th, 1906. The within alienation is hereby approved. Thos. Ryan, Acting Secretary

Office of Indian Affairs, Land Div., Recorded in Miscel., Record Book Vol. 5, page 454, July 23rd, 1906. Filed for Record the 28th day of July, A. D. 1906, at 8 a. m. L. D. Einsel, Deputy Clerk and ex officio, recorder.

Mailed to J. R. Campbell, July 28th, 1906. Vinita, Ind. Ter.

EXHIBIT "B."

Alliance Trust Company to Leander J. Fish.

Loan No. 2281.

For Value Received, The Alliance Trust Co., Limited, (Corporation duly incorporated and organized under the Laws of Great Britton and Ireland), of Dundee, Scotland, does hereby acknowledge full payment and satisfaction of one certain mortgage made and executed by said Alliance Trust Company, Limited, on the following described land situate in the Quapaw Reservation, Indian Territory, viz.:

NE4 of NW4 of SE4 of NW4 and the SE4 of NE4 Section 32, Township 29, Range 23, East.

Bearing Date July 14th, 1906, and recorded in the records of First Recording District I. T., in Book F. of-on page 63, on the 28th day of July, 1906, A. D. and hereby release the premises therein described from the lien of said mortgage and said trustee hereby *recovers* said premises to the makers of said mortgage their heirs and assigns.

In Testimony Whereof, It has caused these presents to be signed in its behalf by George Murray, its true and lawful attorney in fact, and said trustee has hereto set his hand and seal this 20th day of June, 1908.

The Alliance Trust Company, Limited,
By George Murray, (Seal)
Its Attorney in Fact.

State of Missouri, County of Jackson—ss.

Before me, a Notary Public in and for said County and State on this 20th day of June, 1908, personally appeared George Murray, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its attorney in fact, and acknowledged to me that he executed the same as his free and voluntary act and deed as attorney in fact, and as the free and voluntary act and deed of such corporation.

The Alliance Trust Company, Limited, of Dundee, Scotland, for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and Notarial Seal the day and year first above written. Minnie B. Secrist, Notary Public in and for Jackson County, Mo. (Seal) My commission expires April 7th, 1909.

EXHIBIT "C."

This Indenture, Made and entered into this 29th day of April, A. D. 1912, by and between Leander J. Fish, of the Quapaw Reserve, in Oklahoma, an allottee of the Quapaw tribe of Indians, party of the first part, and Dallas Hopper, of Miami, party of the second part:

Witnesseth: that the said party of the first part for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part receipt of which is hereby acknowledged, in consideration of the rents or royalties, undertakings and agreements hereinafter stated to be paid and performed by the said party of the second part, his successors, assigns, and sublessees, does by these presents demise and lease unto the party of the second part, successors and assigns, and sub-lessees the following described tracts or parcels of land, viz:

> East half of Northwest Quarter and the Southeast Quarter of the Northeast Quarter of Section 32, Township 29, Range 23, East of the Indian Meridian, Oklahoma, containing One Hundred and Twenty acres more or less for the term of ten years from the date hereof,

for the purpose of prospecting, mining, drilling, boring, or digging for oil, gas, asphaltum, lead, zinc, coal and copper and all and every other kind or kinds of valuable minerals, ore, fossil, or vegetable substance whatever, with the right to use as much of the surface of said land and so much of the building stone found thereon as may be properly needed to success-

fully conduct said prospecting and mining operations, also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery, pipe lines upon said premises for successfully carrying on the business of boring, prospecting, mining and prosecuting the object of this indenture, with the right to remove or sell and remove all of said buildings, refineries, machinery and pipe lines, at any time or at the expiration of this lease.

In case there shall not be found in any well so drilled oil, gas, coal, copper or other substances in paying quantities, then the said party of the first part to have said well for his own use, and party of the second part agrees to leave said well in good shape for water, provided said first party pay for the casing therein contained or furnish new casing of the same quality to the second party, if oil mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease.

Party of the first part reserves the right to go upon and visit said lands and mines at such times as may be desired to examine and ascertain the amount of product mined or produced thereon, said second party to have the free use of gas, oil, or coal to operate said property.

In consideration of which the said party of the second part agrees and binds his executors, administrators, assigns, and sublessees to pay or cause to be paid to the party of the first part his executors, administrators, or assigns, at Miami, Oklahoma, a sum of money equal to 5% per centum of the market value at the place mined or produced, of all oil, gas, asphaltum, lead, zinc, coal, copper and all other minerals or substances whatever, which may be mined or removed by the said party of the second part, his executors, administrators, assigns, or sublessees from said land herein leased, and such payments, or royalties or rent shall be made on or before the 15th day of each calendar month during the continuance of this lease for all oil, gas, asphaltum, ore and mineral products and substances above named, mined or removed from the land during the calendar month last preceding such date of payment.

Said party of the second part further covenants and agrees to exercise diligence in conducting said prospecting

and mining operations, and to drill, bore, prospect, open and operate oil wells, shafts, drifts, and mines for the ores, minerals products and substances above indicated, in workmanlike manner, and the said party of the second part further covenants and agrees that he will keep an accurate account of said mining operations, showing the whole amount of oil, ores, etc., mined or removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired to the amount of products mined or removed from said land under this lease.

The party of the second part hereby agrees to begin operations on the above described premises within 90 days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5c per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same.

In Witness Whereof, the parties of the first and second parts have hereunto set their hands, and seals the day and year first above written.

Signed and sealed in the presence of

M. Duffee, Leander J. Fish, (Seal)

J. C. William. Dallas Hopper. (Seal)

State of Oklahoma, County of Ottawa—ss.

Before me, O. B. Ballard, a Notary Public within and for said county and State, on this 29th day of April, 1912, personally appeared Leander J. Fish and Dallas Hopper, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me, that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth. (Seal) O. B. Ballard, Notary Public. My commission expires Nov. 16th, 1913.

Filed for record 4-29-1912-10 A. M. (Book 31, page 167) Lon Lampkin, Reg. Deeds.

Endorsed: Filed Sep. 11, 1916. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 15th day of November, A. D. 1917, the defendant filed his answer herein, which is in words and figures as follows:

Answer.

Comes now the defendant, and for his answer to the allegations of the plaintiffs' petition, admits, denies and avers as follows:

I.

This defendant admits all of the allegations in paragraphs one, two, three, four, five, and six, of the plaintiffs' petition.

II.

This defendant denies all the allegations of paragraph seven of plaintiffs' petition, and avers that it is not true, as by the plaintiffs averred, that the Secretary of the Interior of the United States by his official acts with respect to the land in controversy ratified and confirmed the transfer in the plaintiffs' petition alleged as an alienation of said land, under and pursuant to the provisions of the Act of Congress of June 21, *1916*, but that in truth and in fact the said Secretary of the Interior and the Commissioner of Indian Affairs have never by their official act recognized the conveyance set out by plaintiffs' as an allegation of the land therein described, removing the restrictions from said land under the Act of Congress.

III.

This defendant denies and says that it is not true that Leander J. Fish on the 29th day of April, 1912, executed and delivered to one Dallas Hopper the mining lease described in the plaintiffs' petition, but this defendant avers the facts in that behalf to be that on or about the 29th day of April, 1912, the said Leander J. Fish and the said Dallas Hopper entered into an agreement whereby and by the terms of which the said Dallas Hopper agreed with the said Leander J. Fish that he would pay to said Leander J. Fish, the sum of Sixty Five Dollars, in cash, at the time, and would procure one W. A. Wagoner, a citizen of the City of Miami, Oklahoma, and who was financially responsible to endorse or sign as security a promissory note to be made by the said Leander J. Fish for the sum of Three Hundred Dollars with which the said Leander J. Fish under said agreement with the said Dallas Hopper was to purchase from one Forrest Rallings a team of horses, harness and wagon, then owned by the said Forrest Rallings; that pursuant to said agreement, and in reliance upon the performance thereof by the said Dallas Hopper, the said Leander J. Fish, on the 29th day of April, 1912, signed and acknowledged the lease described at paragraph eight of the plaintiffs' petition and attached to their petition as Exhibit C; that the

said lease was left with a notary public for the said Hopper to perform his part of the said contract;

That thereupon and within a short time thereafter the said Dallas Hopper informed the said Leander J. Fish that the said W. A. Wagoner declined to become the security of said Leander J. Fish for the said money with which to purchase the said team of horses, wagon and harness, and the said Dallas Hopper informed the said Leander J. Fish that he could not then pay the Sixty Five Dollars in cash;

That thereupon it was agreed between the said Leander J. Fish and the said Dallas Hopper that said lease should be held by the said notary, or placed in a bank awaiting the performance of the said agreement by the said Dallas Hopper, and that the said Dallas Hopper would undertake to procure some one else financially responsible, to sign said note with the said Leander J. Fish, that he might complete the purchase of said team, and would obtain the Sixty Five Dollars in cash for the said Leander J. Fish, and this defendant avers that for several days prior to said transaction thus narrated the said Dallas Hopper pretended to be making efforts to procure said security for said Fish and to obtain the Sixty Five Dollars with which to pay the said Fish, but the defendant avers that the said Dallas Hopper never in fact performed said agreement, and the defendant avers that after several days had elapsed, just how long to this defendant is unknown, that said Leander J. Fish learned that the said Dallas Hopper had at the very time he was negotiating with the said W. A. Wagoner to sign the said note, surreptitiously taken said lease and placed the same upon the records of Ottawa County, Oklahoma, without the knowledge or consent of the said Leander J. Fish.

This defendant avers that thereafter the said Leander J. Fish sought the said Hopper for the purpose of obtaining from him a cancellation of said lease upon the records of Ottawa County, Oklahoma, and that after the elapse of considerable time the said Leander J. Fish met the said Hopper in the City of Miami, Ottawa County, Oklahoma, having prepared a blank release of said lease for the execution of the said Hopper, and presented the same to the said Hopper and requested that he sign and execute the same, as a release, and thereupon the said Hopper stated to the said Leander J. Fish that he claimed no interest in the lease, as he had failed to comply with his contract, and that he would execute a release cancelling the said lease on the records of Ottawa County, Oklahoma, but that he was in a hurry at that particular time, but would in a few days execute the said release.

This defendant avers that the said Leander J. Fish thereafter regarded said lease as having been cancelled and surrendered by the said Dallas Hopper, and thereafter executed to this defendant the mining lease hereinafter by this defendant set out.

That as to the matters and allegations of paragraph nine, the defendant says that whether the plaintiffs were at the date of the filing of this petition herein the owners and holders of said lease so made to Hopper he has no knowledge as to the truth of said allegations, but avers that plaintiffs are not the sole owners of said lease at the present time; that he denies at the time of filing of this suit the plaintiffs were in possession of said land; that he denies that said Dallas Hopper upon the execution of said lease immediately entered into possession of said land, and denies that plaintiffs or their assignors have been in possession continuously since the execution of said lease, and denies that plaintiffs, or their assignors, have prospected and developed said land, or sunk numerous test holes upon said land, or have sunk a shaft thereon, or improved and developed said land for mining purposes.

IV.

The defendant, for further answer says that said Hopper's lease was secured by fraud, as heretofore alleged, and that for at least three years thereafter said Hopper and anyone claiming under him abandoned said lease, considered it of no value, and did no work, prospecting, or development on said premises until after the death of Leander J. Fish, and some time in the spring of 1915; that prior thereto and on the 4th day of November, 1912, the said Leander J. Fish, in full reliance that said Hopper was not claiming any rights upon his said land, under the lease so as aforesaid, obtained by the said Dallas Hopper, executed to this defendant a mining lease on part of the said described lands, and other lands of the said Leander J. Fish, a copy of which said lease is hereto attached Marked Exhibit A, and made a part hereof, and on the 6th day of January, 1913, executed to the defendant a mining lease on that part of the land described in plaintiffs' petition not leased by the said Exhibit A, a copy of which said lease is hereto attached, marked Exhibit B, and made a part hereof.

Defendant avers that he entered upon the said land pursuant to the terms of said lease and mined and carried on mining operations, at all times had possession and dominion of said lands for the purpose of performing the conditions and terms of his said lease, and by himself and his sublessees

drilled said land, putting down a large number of test drill holes, from the date of said lease until the spring of 1915, at which time pay ore was struck on said leased land by defendant's sublessees, and thereupon and for the first time the said Dallas Hopper made a claim of right to mine said land under the lease so as aforesaid obtained from the said Leander J. Fish, but did not thereafter prospect in good faith on said land and that neither the said Dallas Hopper, nor his assignees have in good faith sought to obtain the possession of said land for the purpose of mining the same, but have from time to time sporadically gone on some part of said land and dug a shallow hole, then left and after a time would surreptitiously return and go upon another part of said land and dig another shallow hole on some part of same merely intending to keep up an appearance of making claim to possession of said land, but has never had and have not any possession of any part of said leased premises.

That since entering upon said land the defendant has been prospecting and developing said land so leased in good faith and almost continuously, and has expended and caused to be expended in such prospecting and developing and improving such leased lands at least the sum of $175000.00, and that at least $40000.00 of this amount was expended prior to the filing of this suit, and further avers that this defendant by and through his tenants have produced and sold from the lands so leased to this defendant lead and zinc ores of the approximate value of $800000.00 and that by reason of such efforts and expenditures this defendant has caused to be developed on said lands so leased one of the richest mines in the mining district.

The defendant further avers that plaintiffs since the filing of this suit have as aforesaid and are now in bad faith attempting to embarrass the defendant and his tenants by forcibly taking possession of certain parts of said land so leased, and threatening bodily harm to said tenants if interfered with and all of such acts have been repeated several times since the filing of this suit, and said plaintiffs, or some of them, since the filing of this suit have executed numerous assignments of the Hopper lease, or an interest therein, and have had same recorded, thereby seriously clouding the title of this defendant and that all of said acts have been done with the object only of so clouding the title and embarrassing the defendant so that he would be forced to buy their pretended claims.

Wherefore, Defendant prays the judgment of the Court that the plaintiffs take nothing by their suit, and that the Court adjudge that the lease under which plaintiffs claim was aban-

doned and that the defendant holds the first and valid mining rights upon said land, and that during the pendency of this suit the Court grant a temporary injunction enjoining the plaintiffs, each of them, their agents, employees, and anyone claiming under or by them from going upon or attempting to enter possession of the lands involved herein and from in any way or manner interfering with the proper prospecting and development of said lands by the defendant and any person or persons claiming under him and for such other relief as to this Court may appear equitable.

A. SCOTT THOMPSON &
H. W. CURREY,
Attorneys for Defendant.

State of Oklahoma, County of Ottawa—ss.

W. M. Smith, being first duly sworn, on his oath states that he is the defendant in the above styled cause; that he has read the answer herein, knows the contents thereof, and stated that the allegations of said answer are true.

W. M. SMITH.

Subscribed and sworn to before me ths 14th day of November, 1917. ....., Notary Public. My commission expires, June 5, 1919.

EXHIBIT A.

MINING LEASE.

This Indenture, Made and entered into this 4th day of November, 1912, by and between Leander J. Fish, of Ottawa County, Oklahoma, party of the first part, and Wesley M. Smith of Baxter Springs, Kansas, party of the second part.

Witnesseth: That the said party of the first part, for and in consideration of One Dollar to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, and in consideration of the rents or royalties, undertakings and agreements hereinafter stated to be paid and performed by the said party of the second part, his successors, assigns, and sub-lessees, does by these presents demise and lease unto the said party of the second part, his successors and assigns, the following described tracts or parcels of land, viz:

The East half (E2) of the Northwest quarter (NW4) and the West half (W2) of the Northeast quarter (NE4) and the of Section 32; Township 29; Range 23

east of Indian Meridian, Ottawa County, Oklahoma, containing 160 acres more or less acres, more or less, for the term of

ten (10) years from the date hereof, for the purpose of prospecting, mining, drilling, boring or digging for Oil, Gas, Asphaltum, Lead, Zinc and all and every other kind or kinds of valuable mineral, ore, fossil, or vegetable substance whatever, with the right to use so much of the surface of said land, and so much of the timber and building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations; also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery, pipe lines, tanks, concentrating mills, mining derricks and pumping plants, for the business of boring, prospecting, mining and prosecute the object of this indenture, with the right to remove or sell any and all of said buildings, refineries, concentrating mills, machinery and pipe lines, at any time, or at the expiration of this lease. In case there shall not be found in any well so drilled, oil, gas, zinc, lead or other substances in paying quantities, then the said party of the first part to have said well for his own use, and said party of the second part agrees to leave said well in good shape for water; provided said first party pay for the casing therein contained, or furnish new casing of the same quality of the second party. Party of the first part reserves the right to go upon and visit said lands and mines at such times as may be desired to examine and ascertain the amount of product mined thereon.

In consideration of which the said party of the second part agrees and binds his executors, administrators, assign and sub-lessees to pay, or cause to be paid to the party of the first part, his executors, administrators or assigns, at office of party of the second part, a sum of money equal to five per centum of the market value at the place mined or produced, of all Oil, Gas, Asphaltum, Lead, Zinc, and all other minerals or substances whatever, which may be mined or removed by the said party of the second part, his executors, administrators, assigns, or sub-lessees from said land herein leased, and such payments, or royalty or rent shall be made on or before the 15th day of each calendar month during the continuance of this lease, for all ore, minerals, products and substances above named, mined or removed from the land during the calendar month last preceding such date of payment. Such payment of royalties to be paid at Baxter Springs, Kansas. Said party of the second part further covenants and agrees to *exercise* diligence in conducting said prospecting and mining operations, and to drill, bore, prospect, open and operate oil wells, shafts, drifts and mines, for the ores, minerals, products and

substances above indicated, in workmanlike manner. And the said party of the second part further covenants and agrees that he will keep an accurate account of said mining operations, showing the whole amount of oil, ore, etc., mined or removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired as to the amount of product mined or removed from said land under this lease.

The party of the second part hereby agrees to begin operations on the above described premises on or before June 30th, 1913, and in case such operations do not begin within said stated time, said second party agrees to pay to said first part 10 cents per acre yearly, for each and every acre contained in this lease, in lieu of said work.

In witness whereof the said parties of the first and second parts have hereunto set their hands and seals the day and year first above written.

Leander J. Fish (Seal)
Wesley M. Smith (Seal)

Signed and sealed in presence of

.....
.....

State of Kansas, County of Cherokee—ss.

Before me, John Jones, a Notary Public within and for said County and State on this 21st day of November, 1912, personally appeared Leander J. Fish and Wesley M. Smith, to me known to be the identical person.. who executed the within and foregoing instruments, and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth. (Seal) John Jones, Notary Public. My commission expires Sept. 24th, 1913.

Endorsed: 1080 31-695 Mining Lease. From Leander J. Fish to Wesley M. Smith. E-NW W-NE-32-29-23 11-14-12 State of Oklahoma, County of Ottawa, ss. This Instrument Filed for Record this day Dec 11 1912 1 PM in the office of Register of Deeds, at Miami, Ottawa County, Oklahoma, and recorded in book 31 on page 695 Lon Lampkin, Register of Deeds, By Lessie Labadie, Deputy. 1.75 W. M. Smith, Baxter Springs, Kansas.

EXHIBIT B.

MINING LEASE.

This Indenture, Made and entered into this 6th day of January, A. D. 1913, by and between Leander J. Fish and Joseph P. Fish, of the first part, County of Ottawa, State of Oklahoma, party of the first part, and W. M. Smith of the County of Cherokee and State of Kansas party of the second part.

Witnesseth, That the said party of the first part, for and in consideration of the sum of Ten Dollars to them paid by the said party of the second part, the receipt of which is hereby acknowledged, and in consideration of the rents or royalties, undertakings and agreements hereinafter stated, to be paid and performed by the said party of the second part his successors, assigns, and sub-lessee, do by these presents demise and lease unto the said party of the second part his successors or assigns, the following described tracts or parcels of land situate in the County of Ottawa, and State of Oklahoma, to-wit:

> The Southeast quarter (SE4) of the Northeast Quarter (NE4) of Section thirty two (32) township twenty nine (29) Range twenty three East (23 E),

containing in all forty (40) acres more or less for the term of ten years from the date hereof, for the purpose of drilling, boring, digging, prospecting and mining for oil, gas, lead, zinc, and all and every other kind or kinds of valuable mineral or ore, or fossil or vegetable substance whatever, with the right to use so much of the surface of said land and so much of the timber and building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations; also the right of way over and across said land whereon to construct and operate such line or lines of wagon or railroad as may be necessary to carry on and prosecute the object of this indenture; also the right to erect buildings, refineries, machinery and pipe lines upon said premises, for successfully carrying on the business of boring, prospecting and mining, and prosecuting the objects of this indenture, with the right to remove or sell any and all said buildings, refineries, machinery and pipe lines at any time, or at the expiration of this lease. In case there shall not be found, in any well so drilled, oil, gas or other substances in paying quantities, then the said parties of the first part to have said well for their own use, and said party of the second part agrees to leave said well in good shape for water; Provided, said first parties pay for the casing therein contained, or furnish new casing of the same quality to the second party. Party of the first part re-

serves the right to go upon and visit said land and mines at such times as may be desired to examine and ascertain the amount of product mined or produced thereon.

In consideration of which the said party of the second part hereby agrees and binds his executors, administrators, or assigns, or sub-lessees to pay or cause to be paid to the parties of the first part their executors, administrators or assigns, at their office a sum of money equal to five per centum of the market value at the place mined or produced of all oil, gas, asphaltum, lead, zinc and all other minerals or substances whatever, which may be mined or removed by the said party of the second part his executors, administrators, assigns, or sub-lessees, from said lands herein leased and such payment of royalty shall be made on or before the 15th day of each calendar month during the continuance of this lease for all oil, gas, asphaltum, ore minerals, products and substances above named, mined and removed from the land during the calendar month last preceding such date of payment. Said party of the second part further covenants and agrees to exercise diligence in conducting said prospecting and mining operations, and to drill, bore, prospect open and operate oil wells, shafts, drifts and mines for the ores, minerals, products and substances above indicated, in a workmanlike manner. And the said party of the second part further covenant and agrees that he will keep an accurate account of said mining operations showing the whole amount of oil, ore, etc., mined or removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired as to the amount of product mined or removed from said land under this lease.

The parties of the second part hereby agree to begin operations on the above described premises within six months after date of this lease, and in case such operations do not begin within said stated time, said second parties agree to pay to said first parties ten cents per acre, yearly, for each and every acre contained in this lease, in lieu of said work. Should said second party fail to comply with the terms of this lease at any time, said first party may give him written notice that unless said terms are complied with within thirty days from date of said notice, that said lease will be declared forfeited, after which said first party may enter upon and take possession of said premises without further notice.

In witness whereof, the said parties have hereunto set their hands and seals the day and the year first above written.

Leander J. Fish (Seal)
Joseph P. Fish (Seal)
W. M. Smith (Seal)

State of Oklahoma, Ottawa County—ss: This lease was filed and recorded on the Jan 11 1913 8 AM A. D. 191.. and duly recorded in Book 34 at page 78. Lon Lampkin, Reg. Deeds. Lessie Labodie, Deputy.

State of Kansas, Cherokee County, ss.

Before me, A. B., a Notary Public, in and for said county and State, on this 7th day of January, 1913, personally appeared Leander J. Fish, Joseph P. Fish and W. M. Smith, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

(Seal) John Jones, Notary Public.

My commission expires Sept. 24th, 1913.

Endorsed: Filed in open court Nov. 15, 1917. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 26th day of November, A. D. 1917, the plaintiffs filed reply to defendant's answer, which is in words and figures as follows:

Reply.

Come now the plaintiffs and make a reply to the set-off and counter-claim set forth in the answer herein, and reserve unto themselves and do not waive the provision of rule 31, that any new or affirmative matter found in the answer be deemed to be denied by the plaintiffs, and show *the* the Court, as follows:

That plaintiffs deny the allegations contained in paragraph three of the answer to the effect that the said mining lease was made and executed and placed in escrow as set forth, until such time after the said Dallas Hopper should pay the sum of Sixty-five Dollars ($65.00), and sign a note with him as the purchase price of a team of horses, or as more fully alleged in the answer.

Plaintiffs expressly denies that the said lease was left with a Notary Public, or with a banker or with anyone else in escrow subject to the performance of the condition of the contract mentioned in the answer. Plaintiffs deny that the allegations in the answer found at the bottom of page two, and at the top of page three, to the effect that said Hopper hav-

ing failed to sign the said note and to pay the Sixty-five Dollars ($65.00), agreed that the said lease should be held in escrow by a Notary Public or placed in the bank to wait the performance of the said alleged agreement by the said Dallas Hopper, because there never was any such agreement.

Plaintiffs deny that he ever agreed to sign any notes with the said Fish, or to pay him any sum of money in addition to that, as set forth in the contract, or mining lease here in question. Plaintiffs deny that the said Hopper surreptitiously took the said lease and placed the same upon the records of Ottawa County, without the knowledge or consent of the said Leander J. Fish.

Plaintiffs deny that the said Leander Fish ever sought the said Hopper for the purpose of obtaining from him the said cancellation of said mining lease, and denies that any cancellation was ever prepared or ever presented to the said Hopper with the request that he sign the same, and denies that he ever agreed to execute any such cancellation or release or disclaimer, but plaintiffs allege the facts to be that the said mining lease was made, executed and delivered as set forth in the petition and not otherwise, and alleges and shows the fact to be that he has in all things performed the conditions and covenants contained in said mining lease, and during the life of the said Leander J. Fish, paid to him when it was due the money provided in said lease in lieu of mining operations.

Plaintiffs further allege and show to the court that no such agreement as a consideration for the said lease claimed in Paragraph Three, Pages Two and Three, of plaintiffs' petition, was ever made and entered into by and between the said Hopper and the said Leander J. Fish, but shows the fact to be that if the said Hopper did make any such agreement as is alleged in defendant's answer, that the said agreement was abrogated and made null and void, and a new agreement entered into by operation of law, in this: That the said Leander J. Fish waived all of said terms and agreements and entered into and accepted the contract as set forth in mining lease made to said Hopper, because after its execution and after the time set forth in the answer, and up to the time of his death in November, 1914, the said Hopper paid to the said Fish, and the said Fish accepted, the consideration and rentals named and set forth in the said Hopper mining lease, and the defendants are therefore, estopped from claiming any rights under their prior alleged contract.

Making further reply to the allegations contained in defendant's answer, plaintiff admits the execution and recording of the mining leases, defendant's Exhibit "A" and "B"

attached to said answer, but shows to the court that the said leases are null and void at this time and were null and void, and were made null and void prior to the pending of this action; that the said mining leases were made, executed and delivered to the said W. M. Smith by the said Leander J. Fish for no consideration whatsoever except as security for a certain debt that the said Leander J. Fish owed to the said W. M. Smith; that it was expressly agreed by and between the said Leander J. Fish and W. M. Smith at the time the said leases were executed, that the same were taken only for the security for the payment of the said debt which the said Leander J. Fish then and there owed to the said W. M. Smith, and that when the said debt should be paid that the said mining leases should be null and void and of no effect, and would be cancelled by the said W. M. Smith; that the said debt, for which the said mining leases were given, has long since been paid and neither the said Leander J. Fish or his estate are now indebted to the said W. M. Smith after any manner whatsoever, and the said debt has been entirely extinguished, and by reason thereof, the said mining leases have been made null and void, and plaintiffs asks the court to declare the same null and void and cancelled of record, that the same may not cloud the title of these plaintiffs.

Wherefore, plaintiffs prays judgment as asked for in the petition herein, and for such further equitable relief as to the Court may seem just and expedient.

P. A. EWERT,
A. C. TOWNE,
H. L. DAVENPORT,
Plaintiffs' Attorneys.

Endorsed: Filed Nov. 26, 1917. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 2nd day of July, A. D. 1919, the following proceedings were had herein, Honorable R. L. WILLIAMS, Judge, present and presiding:

Order Submitting Cause on Briefs.

Now on this 2nd day of July, 1919, come the plaintiffs, by counsel, and comes the defendant, by counsel, and the trial of this cause is resumed. And it is ordered by the Court that said cause be submitted on briefs. It is further ordered that plaintiffs and defendant herein be allowed until the 25th day of September, 1919, in which to file briefs.

And, to-wit, on the 29th day of September, A. D. 1920, the court filed his order on the issues of fact and questions of law herein, which is in words and figures as follows:

Order.

I find the issues of fact and also the questions of law in favor of the plaintiff. The attorneys in the case are directed to prepare and submit to the court a decree accordingly.

R. L. WILLIAMS, Judge.

Endorsed: Filed Sept. 29, 1920. W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 30th day of October, A. D. 1920, Paul A. Ewert et al. filed application to be made parties plaintiff herein, which application is in words and figures as follows:

Application to Be Made Parties Plaintiff.

Come now the undersigned and represent and show to the Court that they each are parties in interest in the above entitled action in this, that they respectively now claim to hold and do hold an interest in and to that certain mining lease made, executed and delivered under date of April 29, 1912, by Leander J. Fish to Dallas Hopper, covering the following described lands, to-wit:

> The East One-half (E2) of the Northwest Quarter (NW4), and the Southeast Quarter (SE4) of the Northeast Quarter (NE4) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian, Ottawa County, Oklahoma, containing 120 acres more or less,

the said mining lease being the subject-matter of litigation in this suit; that said interests respectively in said mining lease have been acquired by the undersigned since the date of the institution of the above entitled suit, and your petitioners respectively pray this court that they be so made parties plaintiff to this suit before judgment is enered in said case; that when said judgment is entered that it be entered in their favor along with the principal plaintiffs, as their interests shall be and have been made to appear in this case respectively.

PAUL A. EWERT,
A. C. TOWNE,
E. M. LANDRUM,
MRS. THERESA MCCLELLAND,
FRANK GAINES.

Endorsed: Filed Oct. 30, 1920. W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

And on the same day, to-wit, the 30th day of October, A. D. 1920, the court filed his final decree herein, which is in words and figures as follows:

In the District Court of the United States for the Eastern District of Oklahoma. W. P. McCullough, D. E. Beth, Thomas F. Phillips, Frank Gaines, Theresa McClelland, E. M. Landrum, A. C. Towne, and Paul A. Ewert, Plaintiffs, vs. W. M. Smith, Defendant.—No. 2305-E.

Decree.

This cause coming on to be heard on the 18th day of April, 1919, at the City of Muskogee, in the United States District Court in and for the Eastern District of Oklahoma, upon the amended petition of the plaintiffs, W. P. McCullough, D. E. Beth and Thomas F. Phillips, and the amended answer of the defendant, the plaintiffs, W. P. McCullough, D. E. Beth and Thomas F. Phillips appear by their attorneys, Paul A. Ewert, A. C. Towne, and James Davenport, and the defendant appears in person and by his attorneys, A. Scott Thompson, H. W. Currey and Leslie J. Lyons, and the parties announce ready for trial. After hearing the evidence, the arguments of counsel, and considering the briefs subsequently filed by the plaintiffs and defendant respectively, the Court finds the issues in this case in favor of the plaintiffs and against the defendant.

The Court further finds that the mining lease under which the plaintiffs claim in this suit, made, executed and delivered by Leander J. Fish to Dallas Hopper under date of April 29, 1912, and thereafter, to-wit: On the 29th day of April, 1912, filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book 31 on page 167 of the records of said office, leasing to the said Dallas Hopper for mining purposes, the

> The East One-half (E2) of the Northwest Quarter (NW4) and the Southeast Quarter (SE4) of the Northeast Quarter (NE4) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian, Ottawa County, Oklahoma,

and thereafter assigned to the plaintiffs in this suit, was, at the date of its execution and delivery, and now is, a valid min-

ing lease upon said lands for the period and term therein named.

The Court further finds that the mining lease under which the defendant claims, to-wit: That certain mining lease made, executed and delivered under date of November 4, 1912, by Leander J. Fish to Wesley M. Smith, covering the

> East One-half (E2) of the Northwest Quarter (NW4) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian, Ottawa County, Oklahoma,

(and other lands not mentioned in this suit), and thereafter, to-wit: On the 11th day of December, 1912, filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, was, at the time of its execution and delivery, and now is, an invalid mining lease upon said lands as against these plaintiffs, and that the defendant has no valid mining lease upon said land, nor any right, title *of* interest of any kind therein as against these plaintiffs for the term of plaintiffs' said lease.

The Court further finds that the mining lease made, executed and delivered on the 6th day of January, 1913, by Leander J. Fish to the defendant, W. M. Smith, leasing to the said lessee for mining purposes the

> Southeast Quarter (SE4) of the Northeast Quarter (NE4) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian, Ottawa County, Oklahoma,

for the term of ten years, which said lease was thereafter, to-wit: On the 11th day of January, 1913, filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book 34 on Page 77 of the records of said office, was, at the date of its execution and delivery, and now is, an invalid mining lease and as against the plaintiffs for the term of their said lease, is invalid; that the said defendant has no valid lease upon said lands, nor any right, title or interest of any kind therein as against the plaintiffs for the term of plaintiffs' said lease.

Wherefore: It Is Hereby Ordered, Adjudged and Decreed, That the said lease under which the plaintiffs claim, dated April 29'', 1912, and recorded as hereinbefore alleged, covering said herein described lands, is and was a valid mining lease upon said lands for the term therein named, and that the leases under which the defendant claims dated November 4, 1912, and January 6, 1913, and recorded as hereinbefore al-

leged, were and are void and of no effect as against the rights of the plaintiffs for the term named in their said lease, and the same are hereby annulled and cancelled of record pro tanto, that is in so far as this conflicts with the plaintiff lease, and the relief prayed for by the defendant in his answer is denied.

The Court further finds that prior to the filing of this suit the said Dallas Hopper assigned all his right, title and interest in and to the said mining lease to the plaintiffs, W. P. McCullough, D. E. Beth and Thomas F. Phillips, and that they were at the time of the filing of this suit, the owners and holders of said lease and at said time were in possession of the hereinbefore described lands under and pursuant to the terms and conditions thereof; that shortly after the filing of this suit the defendant wrongfully and unlawfully dispossessed the said plaintiffs of a portion of said land, to-wit:

> The East One-half (E2) of the Northwest Quarter (NW4) of Section Thirty-two (32), Township Twenty-nine (29) Range Twenty-three (23), East of the Indian Meridian, Ottawa County, Oklahoma,

and ever since said time has been and now is wrongfully and unlawfully in possession of said premises.

Wherefore: It Is Further Ordered, Adjudged and Decreed, That the writ of injunction heretofore issued out of this Court restraining the plaintiffs from entering or attempting to enter into the possession of the said

> East One-half (E2) of the Northwest Quarter (NW4) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), Ottawa County, Oklahoma,

be, and is dissolved, and the defendant, their agents & employees, are hereby enjoined from interfering with plaintiffs' possession of any of said lands which are now in their possession for mining purposes.

It Is Further Ordered, Adjudged and Decreed That the plaintiffs have judgment against the said defendant for their costs and disbursements herein. To which action of the court the defendant in open court duly excepts and still excepts.

Dated at Muskogee, Oklahoma, this 30th day of October, 1920.

R. L. WILLIAMS,
United States District Judge.

Copy received A SCOTT THOMPSON

Endorsed: Filed Oct. 30, 1920. W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

And, on the same day, to-wit, the court filed his order allowing the defendant his exceptions to the order permitting plaintiffs to amend their bill by adding new parties plaintiff, which is in words and figures as follows:

Order Allowing Exceptions to the Order Permitting Plaintiffs to Add New Parties Plaintiff.

It is ordered that the defendant be allowed his exceptions to the order of the court permitting the plaintiffs to amend their bill by adding new parties plaintiff; that the defendant be allowed exceptions to the decree herein entered and each part thereof, both as to form and substance; that the defendant be allowed exceptions on his objections to evidence as filed herein; that all process under this decree be stayed for ninety days from the date hereof to permit the defendant to make his appeal to the Circuit Court of Appeals.

Dated this 30th day of October, 1920.

R. L. WILLIAMS, Judge.

Endorsed: Filed Oct. 30, 1920. W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 21st day of February, A. D. 1921, the defendant filed objections to the testimony herein, which are in words and figures as follows:

Defendant's Objections to Testimony.

Comes now the defendant, pursuant to order of the Court made in this cause during the trial thereof, and more particularly the order of the Court made herein on the 24th day of January, 1921, and offers the following list of objections to the testimony given in said cause as transcribed, in addition to objections made at the time of trial, to-wit:

1. We object to and move to strike all that part of the testimony of the witness Dallas Hopper commencing with the question at the top of page 12 of the transcript, said question being:

> "Q. I will ask you to state if you ever took a lease on this allotment from Fish,"

and ending with the question and answer at the bottom of page

30 of said transcript, said question and answer being as follows:

"How much was the total amount which you paid? A. Twenty dollars and sixty cents."

We object to said questions and answers, and each of them, and move that same be stricken, for the reason the witness is attempting to detail matters concerning a transaction with a man now dead, Leander J. Fish, and the defendant, W. M. Smith, being the assignee or lessee of said deceased person, the said witness being a lessee of said deceased person, and having assigned to the plaintiff herein. This testimony is clearly incompetent under the statutes of the State of Oklahoma governing evidence, and should be excluded. We make this objection and motion in order to make the record definite, although the Court at page 30 expressly excluded this testimony on the same ground.

Objection and motion .....

Defendant .....

2. We object to and move to strike the testimony of W. P. McCullough, page 45 of the transcript, beginning with the answer——

"A. No, I started sinking a shaft and we were run off,"

and ending on page 46 with the answer——

"A. No."

This is objected to on the ground that it is mere hearsay as stated by the witness.

Objection and motion .....

Defendant .....

3. We object to and move to strike the answer of the witness McCullough on page 49, being as follows:

"A. After they were arrested they were taken down to Miami and placed in jail and their bond made for them. Then come time for hearing before the justice of the peace, and the justice dismissed the case he had on account of not having jurisdiction. They were discharged. Well, I went and took possession again, and they went and swore out warrants before the County Judge and arrested Mr. Short, and I went down to bail him out, and they told me they had a warrant for me, and I went down and gave bond,"

for the reason that this is testimony concerning a matter which happened long after the filing of this suit, and there is no

statement of the witness connecting such matters with the defendant herein or anyone acting for him, and is therefore incompetent, irrelevant and immaterial. This is made plain by the answer of the witness on page 53 of the transcript:

"Q. Who were the drill men that were with you? Was Mr. Smith there?

A. No, Mr. Dikes.

The Court: Didn't you testify Mr. Smith was there one time a while ago?

A. If I said Smith I meant Dikes,"

and the Court on the following page struck out this testimony. We now renew it.

Objection and motion .....

Defendant .....

5. We object to and move to strike Exhibit 5, being a map identified by witness C. E. Bidwell at page 62 of the transcript, for the reason that according to the testimony of the draftsman, the witness, the same is not a correct map and does not show the true condition of drilling upon said property. This is disclosed by the question and answer on page 63:

"Q. You just made a showing of the drilling they had done?

A. Made a showing of the drilling on the Southeast of the Northeast.

Q. And three holes up there?

A. Yes, sir, there were other holes in that.

Q. But you were instructed not to show all the drillings?

A. I was instructed only to show those three holes."

This makes it apparent that the map does not disclose a true condition, and it is only correct in so far as it shows location of holes designated by the plaintiff, and is therefore incompetent as a map of the ground and the drillings thereon.

Motion and objection .....

Defendant .....

6. Defendant objects to and moves to strike question and answer of the witness J. C. Willim beginning on page 66 of the record as follows:

"Q. I will ask you to state.

A. Yes, sir, about the first of March and during March.

Q. What year?

A. 1912.

Q. Go on.

A. He wanted me to lease, to go in with Mr. Hopper, he was talking with Hopper several days before he finally took this lease, and he wanted me to put up some money and go in with Hopper and prospect this lease.

Q. Well, in what way?

A. He wanted me to give him some money to show I would go to work and had an interest in the lease.

Q. For the purpose of development?

A. Yes, sir, he said he could develop.

The Court: He wanted you to go in with Hopper?

A. Yes, sir.

The Court: Be a partner with Hopper in taking a lease?

A. Yes, sir.

Q. Did he demand of you or request of you anything in addition to what the lease provided as royalty?

A. Yes, sir, he wanted me to pay him twenty dollars."

We move to strike out this testimony and each part thereof for the reason that it is incompetent, irrelevant and immaterial, and is the relating of a conversation between Leander J. Fish, and the witness, a stranger to the lease in question, and relates to an attempt to enter into negotiations with this witness separate and distinct from the lease in question, and is therefore incompetent and does not tend to prove or disprove any of the issues in this case.

Objection and motion .....

Defendant .....

7. We object to and move to strike the testimony of the witness A. C. Jones, found on page 71 of the record, which is as follows:

"Q. What was said?

A. Fish came in there and asked Hopper to pay him some money.

Q. Just state the conversation.

A. Well, he told him he wanted to get some money, and Hopper says, I haven't any money right now, Jack. He says, I just want a little. Dallas says, How much? He says, Three dollars, and he gave him this money, and he says, Jack, I have overpaid you now, and he says, I will fix that with you.

The Court: Who was he calling Jack?

A. Fish.

Q. Is that all that was said?

A. Yes, sir.

Q. Any reference made to a mining lease at that time?

A. I said they was getting up a mining lease, he had given the mining lease, and he came in and wanted some more money, and Dallas——

Mr. Thompson: We object; the witness is not stating any conversation.

The Court: State what was said as near as you can.

Q. This was in what month?

A. May.

Q. What year?

A. 1912.

The Court: Now what did he say, just give the conversation, you say Jack Fish came in?

A. Yes, sir.

The Court: And wanted some money?

A. Yes, sir.

The Court: Why did he say he wanted the money?

A. Rental on his lease.

The Court: What was said to him?

A. Dallas told him he didn't have any money. Well, he said, he just wanted a little. Dallas asked, How much, and he said, Three dollars. Dallas gave him three dollars and says, I have overpaid you now.

The Court: What did Fish say to that?

A. Well, he says, I will make it all right with you."

We object to this testimony above quoted, and each part thereof, for the reason that it is incompetent and immaterial as to any issue in this case, it being an attempt to prove a money payment on this mining lease, and we submit that it is not proof that any money was paid by Hopper to Fish at this time upon the mining lease, the only fair inference being that the sum of three dollars was paid Fish by Hopper, and for what purpose it does not disclose.

Objection and motion .....

Defendant .....

8. We object to the introduction in evidence of Plaintiffs' Exhibit 7 and 8, introduced as shown by the record pages 89 and 90, for the reason that said exhibits are incompetent, irrelevant and immaterial, not binding upon this defendant, and not tending to prove or disprove any of the issues in this case.

It appears that Exhibit 7 and 8 is a mining sublease made by some of the plaintiffs to this witness on a portion of the disputed ground, executed long after the filing of this suit, as shown by the following answer on page 87:

"A. That was on January, about December 20, when I got this lease here.

The Court: 1917?

A. 1918."

Objection and motion .....

Defendant .....

(Pencil notation on margin:) Overruled.

9. We object to the Court's excluding the offer of Defendant's Exhibit 6 as shown on page 172 of the record, and except to such exclusion by the Court, for the reason that this exhibit was a map prepared by a competent mining engineer, disinterested, showing the location of the disputed grounds, and showing the exact number of holes drilled on each forty-acre tract by and under the defendant prior and subsequent to the filing of the suit, and showing total amount of moneys expended by the defendant in said drilling prior to the filing of this suit and subsequent thereto, and that such map was material and competent evidence for the defendant in establishing his contention and refusing the testimoy of the plaintiffs and their witnesses that no drilling had been done on the disputed property prior to May 5, 1915. We call the Court's attention to his refusal of the same exhibit on page 181 of the record again.

Objection and motion .....

Defendant .....

(Pencil notation on margin:) Same was not excluded but considered and overruled.

10. The defendant objects and excepts to the Court's ruling refusing permission to file an amendment to defendant's answer, being Defendant's Exhibit 45.

Objection and motion .....

Defendant .....

(Pencil notation on margin:) Overruled.

11. The defendants object and except to the ruling of the Court on page 200 of the record, excluding the offer of Defendant's Exhibits 46 and 47, and exhibits being a part of the records of the District Court of Ottawa County, Oklahoma,

wherein the plaintiffs herein are suing the defendant upon a cause of action clearly inconsistent with the present cause of action herein.

Objection and motion .....

Defendant .....

(Pencil notation on margin:) Overruled.

12. The defendants object and except to the ruling of the Court on page 207 of the record excluding the testimony of Ray McNaughton and the Defendant's Exhibit 32. This is clearly an erroneous ruling for the reason that the plaintiffs and their former associates have been permitted over our objection to testify what they had paid for interests in said Hopper lease, and this witness was offered for the purpose of showing, in direct contradiction of the testimony of J. P. McNaughton, that he received a two-thirds interest in this lease from Hopper for no consideration whatever, although the former witness, J. P. McNaughton, had sworn that he had paid, or that his son, this witness, had paid, the sum of two hundred and fifty dollars therefor.

Objection and motion .....

Defendant .....

(Pencil notation on margin:) Overruled.

We make the above objections and motions and save exceptions in order that the record may be made clear and definite and saving unto ourselves all objections and exceptions that were made and taken at the trial and now appearing in the record as transcribed.

H. W. CURREY, and
A. SCOTT THOMPSON,
Attorneys for Defendant.

Endorsed: Filed Feb. 21, 1921. W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 18th day of April, A. D. 1921, the defendant filed statement of the evidence, which is in words and figures as follows:

Statement of the Evidence.

In the District Court of the United States for the Eastern District of Oklahoma. W. P. McCullough, Plaintiff v. *W. M. Smith, Defendant.—No. 2305.*

Now on this 18th day of April, 1919, in the District Court of the United States for the Eastern District of Oklahoma, at Muskogee, came on for trial the above entitled and numbered cause, before the Honorable R. L. Williams, judge presiding; and thereupon appeared the plaintiff in person and by A. C. Towne, Esq., James L. Davenport, Esq., Paul A. Ewert, Esq., his counsel; and appeared the defendant in person and by his counsel Hiram W. Currey, Esq., and A. Scott Thompson, Esq. Whereupon the parties hereto having announced ready for trial proceedings herein were had as follows:

OPENING STATEMENT FOR PLAINTIFF.

Mr. Towne: This action was filed in July, 1916, and is a suit in equity to quiet title to the East Half of the Northwest Quarter of Section 32, and the Southeast Quarter of the Northeast Quarter, one hundred twenty acres but they don't join. I want to get the court's attention directed to the leases. This action was brought to quiet the title to this land, the defendant Smith claiming an interest by reason of two subsequent leases.

The Court: You claim under the prior lease.

Mr. Towne: Yes, we claim under the prior lease.

The Court: And they claim under subsequent leases.

Mr. Towne: The lease that we claim under had what is known as a perpetual lease clause in it. The motion to dismiss the bill was sustained on that; they could lease their land for ten years for mining purposes and no longer, and this lease having that perpetual lease clause in it after reciting ten years and as much longer as——

The Court: The court held that that was an invalid lease.

Mr. Towne: The Circuit Court of Appeals held that they could lease for ten years. Our bill was that the restrictions had been removed off of this land and it was good anyway. The restrictions had been removed but the court held against us, but held that it was a good ten years lease. Therefore the case came back for answer and they then filed——

The Court: Now it is here for trial on the facts.

Mr. Towne: The defense though is just two propositions as I get them from the answer; that is they allege this lease was never delivered, that it was executed and

taken out from the place where it had been left to await the performance of some outside contract and that our man got hold of it some way and filed it. Then they set up second that we have abandoned our lease through a failure to prospect the land under the terms of the lease; so it is narrowed down to those two propositions as to whether the lease was delivered and whether the work and prospecting has been done under the lease.

OPENING STATEMENT FOR DEFENDANT.

Mr. Thompson: Your honor, I would like to make a complete statement of this case. I rather think counsel who has made the statement is not familiar with the case when it was first filed. He was not counsel in the matter. There are two leases here involved; that is the plaintiff's lease and the defendant's lease. The plaintiff in bringing this suit set up the Indian title of Fish and set up that by reason of the approval——

The Court: Was this from Fish too?

Mr. Thompson: Yes, sir, all from Fish. They claimed in their petition, as you will observe, that by reason of certain special Acts of Congress permitting Fish to alienate subject to the approval of the secretary and his subsequent acts, being approved by the secretary, that that constituted an alienation of the property and it was unrestricted property; and then they allege the execution of the Hopper lease, now owned by McCullough, to them. That antedates our leases. We filed a motion to dismiss and it was argued before Judge Campbell that that was not a valid lease as the restrictions were on the land. The only argument was to be whether or not a mortgage, being approved by the Secretary of the Interior, constituted an alienation. Judge Campbell held that the mortgage did not alienate the property under the Arkansas law and that the restrictions were upon the land, therefore the lease was void because of the perpetual clause. An appeal was taken and wasn't even briefed in the Circuit Court of Appeals as to the perpetual clause, because it was conceded. Mr. Ewert made the statement to this court and to the Circuit Court that he couldn't consistently urge it because as an attorney general he had urged that theory. Now, if your honor please, it is back here; the Circuit Court of Appeals have held—I would like for your honor to get this—The Circuit Court of Appeals has held in this case that the lease with that clause, known as the perpetual clause, running for ten years and so forth, does

not invalidate the Indian lease, and also held that the restrictions were upon the lands so far as the approval of those mortgages was concerned, that it did not alienate the legal title. Now, if your honor please, we answered and set up our two leases. The lease claimed by plaintiff was made on April 29, 1912, our first lease on part of the land was taken on November 4, 1912, our second lease was taken on other parts of the land, making a lease on the whole, on January 6, 1913.

The Court: This is not a part of this 200 acres.

Mr. Thompson: All of it. We have leases upon all of it and these gentlemen are claiming 120 acres of the same land made by Leander J. Fish. I want your honor to get the dates, their lease of April 29, 1912, ours taken next November 4, 1912, and the next January 6, 1913.

The Court: Now how do these dates figure in?

Mr. Thompson: I just want to fix the dates with reference to the work done because we are pleading that the proper lease was never lawfully delivered and we will attempt to prove that, that is the Hopper lease.

The Court: Now who held the leases of November 4th and January 6th?

Mr. Thompson: W. M. Smith. Those leases have been introduced in the record in the other case and we will introduce them in this case. Under the Smith lease all this development has been made. Now we contend, if your honor please, that that is an invalid lease because he never did any work under it, and if you will read the opinion you will notice that the Circuit Court of Appeals alleges that they took immediate possession after the execution of that instrument in April, 1912, and have drilled a great many wells and worked continuously and sunk shafts and made development. Our contention is, if your honor please, that they never have in good faith done any work upon this property and we will offer proof to that effect. I think it will be conceded, if your honor please, that these gentlemen are not contending that they ever did any work upon this land until after we made this rich strike on May 5, 1915. That upon May 8, 1915, then they commenced to interfere with our possession and moved on a corner with a drill. The petition alleges that they sank shafts, but the testimony will develop beyond any doubt that they never did sink a shaft beyond thirty-five or forty feet upon that ground. In the meantime Smith in June, 1914, made this sub-contract to Maben and Ma-

ben drilled there for awhile then he got a lease and that was assigned to the Church-Maben Mining Company; the Church-Maben Mining Company then made a sub-lease to Mr. Church and Mr. Church then made the contract with the Montreal. In other words it will develop that at the time they brought this suit we had expended close to $40,000 under our leases.

The Court: Suppose there is a valid lease regardless of whether they made improvements did their failure to make improvements invalidate the lease?

Mr. Thompson: It is an abandonment. We will show this lease known as the Hopper lease has been made dozens and dozens of times. It was an abandoned lease. We will further show that since this suit was brought in this court that this same plaintiff has instituted a suit in Ottawa County against this defendant here claiming a sublease under this defendant on the entire 200 acres of land asking for an accounting. Now I want your honor to get that, that he is claiming to own a sublease.

The Court: Under Smith?

Mr. Towne: We object to that; they haven't plead that in their answer and haven't set it up.

Mr. Thompson: And the matter is now pending; he lost his suit in the District Court of Ottawa County and the matter is now pending in the Supreme Court of this state. He is now here contending that he has a lease prior to Smith and Smith's lease is void, yet he is claiming in another court he has a lease under Smith. We think it will be clear this was an abandoned lease and after we made our strike and after we drilled for over a year about May 8th, after the strike on May 5th, then they commenced to take possession. We went through this matter practically with Judge Campbell on the temporary injunction and there is an order enjoining them from interfering with a part of this land and enjoining us from interfering with another forty during the pendency of the suit.

The Court: Very well, call your first witness.

Mr. Currey: If your honor will permit me to refer to that opinion unless you take time to read it carefully you will not see what the court——

The Court: I will read it carefully.

Mr. Currey: Let me call your attention to this: You will find in the opinion that they first disposed of the question of the restrictions on the land and hold the restriction is not removed. They then discuss the clause in

the lease which provided that the lessee at the expiration of the lease should have the right if they found ore to hold the land as long——

The Court: I will read this opinion over carefully during the trial of the case. I want to get this evidence in and you want to get away.

Mr. Currey: Yes, I will save time by making this statement now. Then they come down and discuss another clause in the lease which is the very thing that is to be tried here. That is the ten cents an acre clause. Now when they come to that they say that the allegations are that they took possession and had since that time carried on the mining operations and the point I want your honor to catch is that they refer it back to try the equities that would arise from that opinion.

The Court: All right.

Mr. Davenport: Your honor please it is just a question of fact.

The Court: Call your witness.

DALLAS HOPPER, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Towne.

Q. State your name. A. Dallas Hopper.
Q. Where do you live? A. Douthit.

The Court: Now except as to whether predicates should be laid, or where objection is made on the ground it is hearsay or leading, or it is not the best evidence, it is understood that either side may raise in their briefs questions of the admissibility of the evidence and the same to be ruled on then and may be put in the record just as if the objection was raised now and passed on, and where they don't raise them in their briefs the objection will be considered waived.

Q. How long have you lived in the mining district of Ottawa County? A. About ten years.
Q. How long have you been in the mining business?
A. About ten.
Q. Were you acquainted with Leander J. Fish during his lifetime? A. I was.
Q. And his allotment in Ottawa County? A. Yes, sir.

Mr. Currey: Now we object to this witness testifying to any conversation or transaction with Leander J.

Fish, for the reason that Leander J. Fish is deceased and this witness appears to be one of the parties to the lease plead by the plaintiff in this case. You are the Hopper that is plead in this case as——

The Court: Is he a party to the suit?

Mr. Towne: It don't show he has any interest in it now.

Mr. Currey: He is the assignee of the present plaintiff in the case.

The Court: Let's pass on that question now. Is Smith the assignee?

Mr. Thompson: He is the assignee.

The Court: In what respect?

Mr. Thompson: He is the lessee.

The Court: Have you any interest in this controversy?

A. Yes, I have in a way a sublease.

The Court: You say you have a sublease?

A. Yes, sir.

The Court: Who did you get that from?

A. W. P. McCullough.

The Court: Under what consideration did you get it?

A. Well to drill.

The Court: Do you claim any interest in this Hopper lease from Fish?

A. No, I haven't got any.

The Court: You say you have no interest in it?

A. No, sir.

The Court: You don't claim any interest in this suit then?

A. No, sir, only by my sublease.

The Court: Now this party he assigned this lease to McCullough this man Hopper.

Mr. Thompson: Part of it if your honor please.

The Court: Well he can't testify to the transaction with Fish as to that part he assigned to McCullough.

Mr. Thompson: Of course we raise the question that the plaintiffs are not the owners of this lease.

The Court: I understand, but as to the transaction as to the conversation.

Mr. Ewert: Here is the proposition: Dallas Hopper originally had this lease; he assigned it all to Mr. McCullough; now he has a sublease back from Mr. McCullough on a portion, but the plaintiff in this suit is not Leander J. Fish, nor his executor nor his administrator and the controversy is between two disinterested persons, both of whom claim under Fish; the controversy is between McCullough and Smith and not between the administrator or executor.

The Court: I will let him testify now; I will reserve my ruling. You can reserve your exception for the present.

Q. I will ask you to state if you ever took a lease on this allotment from Fish? A. I did.

Q. Mining lease? A. Yes, sir.

Q. Do you remember the date of it? A. Yes, sir, I do.

Q. What was the date of it? A. April 29, 1912.

Q. I hand you the Plaintiffs' Exhibit No. 1 and ask you to examine it.

Mr. Currey: It is understood we are objecting to his competency to testify to all these matters.

The Court: Yes, sir.

Q. And ask you if that is the lease that you and Fish executed on the 29th of April, 1912?

Mr. Currey: Well I object for the reason that that is not a proper question regardless of the incompetency of the witness.

The Court: What was the question. (Question read by the reporter.) Yes he may state that, that is for the purpose of identification.

A. Yes, sir, that is the lease.

Q. State where this lease was executed.

A. In Miami, Oklahoma.

Q. And before whom was it acknowledged?

A. O. B. Ballard.

Q. What official capacity did he hold?

A. Notary public.

Q. Now just go on and state the circumstances under which you executed this lease and who was present and who witnessed the lease if anybody, and the time of day it was made and state what you did with it if anything after it was executed.

Mr. Currey: Now to be sure there is no mistake here. You are the grantee named in this lease?

A. Yes, sir.

Mr. Currey: And you are the person who assigned this lease to McCullough?

A. Yes, sir.

The Court: But you don't claim any interest in that lease now?

A. No, sir.

Mr. Currey: If the court please I make this objection, it is in the 55th or 56th Oklahoma, where an allottee granted a lease to A and A assigned to B and the allottee made a subsequent lease; and they held that the allottee couldn't testify because she was in a sense the grantor of the assignor of one of the parties.

The Court: Go ahead, I will permit him to testify.

(Question read by the reporter.)

A. Well Fish came to me and we agreed upon the lease and went down to Mr. Ballard's office——

Mr. Thompson: We object to that, that they agreed upon the lease, and move that that be stricken as a mere conclusion.

The Court: Yes, that is a conclusion; that will be stricken out. Go ahead.

A. We went down to draw up the lease and on the road down there by the Ottawa County National Bank I met Mr. Williams and I asked him to come go down to the office there only a few steps and we went down there and I asked him to sign the lease as a witness, which he did; and while the lease was being filled out then I went across to Mr. Duffey's store and I asked Mr. Duffey to come sign as a witness, and he come over and signed as a witness; and then when the lease was filled out I taken it from there right down to the court house and filed it for record.

Q. Was the lease read over to the parties?

Mr. Currey: We object as leading and suggestive.

The Court: Yes, who was present when he made the lease?

A. Mr. Duffy.

The Court: Which Duffy?

A. M. E., I believe.

Mr. Towne: It is M. on the lease.

A. And Williams, Ballard and myself.

Q. I will ask you to state if the lease was delivered to you at the time?

Mr. Currey: We object to that as leading and suggestive.

The Court: Well how did you get the lease if you got it?

A. Well Mr. Ballard when he got it filled out turned it over to me.

The Court: Who was present when he turned it over to you?

A. Williams and Duffy.

The Court: Anybody else?

A. No, sir.

The Court: Who signed it?

A. Williams, Duffy, Fish and myself.

The Court: Was Mr. Fish present?

A. Yes, sir.

The Court: And Mr. Ballard handed it to you?

A. Yes, sir.

The Court: Go ahead.

Q. Well what did you do with it then?

A. I went down and filed it for record.

Q. Where at?

A. At the recorder's office, court house.

Q. After you recorded the lease or before did you make any payment of lieu money to Fish?

Mr. Thompson: Object to that question as incompetent, irrelevant and immaterial, leading and suggestive.

Mr. Currey: And of course we are objecting to all this on the competency of the witness to testify.

The Court: Yes. If any payment was made to anybody state to whom it was made and how it was made, in whose presence it was made.

A. Well, yes, sir, I paid Mr. Fish $7.50 the morning that the lease was taken.

The Court: Who was present?

A. There was no one present, we just stepped out on the corner.

The Court: Was that before the lease was executed?

A. After it was executed.

The Court: Who had the lease in possession then?

A. I did.

The Court: Go ahead.

A. And I gave him the $7.50 and we didn't stand there but just a moment or two and I went on down to the court house and filed it for record.

Q. At any time subsequent to that or after that did you make any other payments to him and if so how much and when?

Mr. Thompson: We object as leading.

The Court: Yes.

Q. Well, I will put it this way then: State if you made any other payments when it was made and to whom you made it and who was present and how did you make it.

Mr. Thompson: I think the question should be: what did you do?

The Court: Yes.

Q. If any other payments were made in lieu money state when, of lieu money, state when they were made and how.

A. They were made to Leander J. Fish and I have——

The Court: Whereabouts?

A. In Dardeen's Pool Hall in Miami.

The Court: Who was present?

A. Well, Mr. Jones was present at one time.

The Court: Which Jones?

A. A. C. Jones, and the house was always full, and when he would come in and want a little money——

The Court: Did you run the pool hall then?

A. Yes, sir, I was working in there.

Q. How many different times and what amounts altogether have been paid and when?

A. Well, I don't remember just the dates of them, I gave them to Mr. McCullough in a little note book. Whenever I would pay I just put that down in the book and I gave that to Mr. McCullough and some way or other it got misplaced among the attorneys or some of them when the case was pending down at Tulsa.

Q. When was the last payment you made?

A. I think along the last of October or first of November, 1914.

Q. What was that amount?

A. As well as I remember it was $3.60.

Q. How much was the total amount which you paid?

A. $20.60.

Q. Now Mr. Hopper after that lease was executed what was done if anything and when in the way of developing the lease?

A. Well on May 5th, 1915, I commenced a shaft on the Southeast of the Northeast.

The Court: When was that?

A. May 5, 1915.

Q. Just go on and tell what was done in the way of development.

A. Well we sunk the shaft down to thirty-four feet and something and then we put a drill on it and then we drilled and sunk two other shafts one about twenty-eight feet, as well as I remember, and the other fifty-eight feet—forty-eight feet.

Q. One forty-eight and the other what?

A. The other about twenty-seven feet as well as I remember.

Q. Well go on and tell what was done in the way of drilling if anything.

A. Well we drilled four holes right near the shafts, and then we moved the drill over on the northwest corner of the forty.

Mr. Currey: Drilled four holes where?

A. Near where the shafts were started.

The Court: When was this?

A. 1915.

The Court: What time?

A. We commenced drilling in June, 1915, about the latter part of June, I think.

The Court: When was the date of the transfer of this lease?

Mr. Towne: You mean to McCullough?

The Court: Yes.

Mr. Towne: It was prior to that.

The Court: Was it before Fish died or after?

Mr. Towne: Fish died in 1914.

Mr. Ewert: In order that the court may get at this intelligently we will identify this survey and while he is testifying may the court have this before him?

The Court: When was this transfer, I want to find that out first, before or after Fish died?

Mr. Thompson: I think the petition shows.

Mr. Towne: It was transferred before.

The Court: Offer the assignment in evidence and let's see. (Refers to Plaintiffs' Exhibit No. 2.) This covers the east half of the northwest quarter. and the southeast quarter of the northeast quarter of section 32, town-

ship 29, range 23, and shows on the 9th day of April, 1915. When did you say you began this development work?

A. May 5th, 1915.

The Court: Now was that after you made this assignment?

A. Yes, sir.

The Court: Who were you working for?

A. I was working under a sublease from McCullough, contract for a lease rather.

The Court: What was the consideration of this assignment to him?

A. I don't remember just what it was that he paid me for it, and what he got from me.

Mr. Currey: Of course we object to any testimony in regard to a sublease unless it is produced; the lease would be the best evidence.

The Court: Of course I will let him testify he was working under McCullough. Go ahead.

Q. Well go on now and state what was done if anything in the way of developing the land up to the time of this injunction.

A. Well we drilled a number of holes along the north side of the forty.

Mr. Currey: We object to his statement in general.

Mr. Towne: We will identify that.

The Court: Well go ahead and identify it.

Mr. Towne: I just want to show the general work that was done under that lease.

The Court: No, sir, state what he did, how many holes he sunk.

Q. That is what I am asking him.

A. We drilled twenty-eight holes.

The Court: On what forty now?

A. On the southeast of the northeast.

Q. How many holes if any on the other portion of the lease and where? A. I didn't drill any.

Q. I am not asking you what you did but what was done if you know in the way of development?

A. Well there was three holes on the northeast of the northwest.

The Court: Who drilled them?

A. McCullough and Adam Scott:

Q. Now on the whole lease how many holes had been drilled? A. Thirty-two to my knowledge.

Mr. Thompson: I think, if your honor please, this ought to be limited to the time this suit was brought, not such work as has been done since that time.

The Court: Yes, up to the time the suit was begun.

Mr. Towne: You say we have abandoned it and we show we have been working there ever since.

Mr. Thompson: I say you abandoned it until we struck the ore.

Mr. Towne: We hadn't come on there when you struck the ore?

The Court: Anybody else made any development on this 120 acres of land when you started working there?

A. No, sir.

The Court: Nobody else had sunk a hole?

A. Not to my knowledge, no, sir.

The Court: Well you would know if they had wouldn't you?

A. Yes, sir.

The Court: Go ahead. Now then on the theory of the objection of Mr. Thompson of course if it is incompetent for them to show development made after the suit was brought it will be incompetent for you to show it, and the issue in this case will be tried out on the status at the time the suit was begun.

Mr. Thompson: All right.

Mr. Towne: Our theory is we had done some work and was in possession when the suit was brought and have kept that up since.

The Court: Well if you have any authorities be ready to present them and I will hear you. Go ahead.

Q. State if you can and if you know the approximate amount that has been expended on that lease in the way of development.

Mr. Currey: By whom?

Mr. Towne: Well by the parties that now claim it and the ones that made the expenditures under them.

The Court: By McCullough and those working for him.

A. About $8,000.00 I think.

Mr. Currey: About how much?

A. About $8,000.00.

Q. Now at the time this suit was begun July 1, 1916, who was in possession.

Mr. Currey: Oh, I object to that, he can't state who was in possession, that is a conclusion.

Q. Well, who was working on this 120 acres?

Mr. Currey: We object to that.

The Court: That is competent.

Q. That is when the suit was begun, July 1, 1916?

The Court: Now on July 1, 1916, who was working on this 120 acres of land if you know?

A. Walker and McAuley.

The Court: Who were they working under?

A. Under McCullough.

Q. At that time was the defendant Smith or any one claiming under him in July on this 120 acres or doing any work on it?

Mr. Currey: Oh, we object.

The Court: Yes, sir. Anybody else other than Walker and McAuley doing any work on this 120 acres of land.

A. No, sir, there wasn't.

Q. Well state the nature of the work they were doing.

The Court: Where is the contract you had with McCullough, this sub-contract?

A. I let Mr. Walker and Mr. McAuley have it and a little later they got another contract from Mr. McCullough.

The Court: Was it a written contract?

A. Yes, sir.

The Court: What became of that?

A. I don't know unless they have it.

The Court: Have you made any effort to get a copy of it?

A. Yes, I asked Mr. McCullough if he had a copy and he said he didn't, didn't think he did.

The Court: I think you should produce that contract.

Q. Did you ever try to find the contract from Walker and the other associate? A. Yes, sir.

Q. Have you been able to do that? A. No, sir.

The Court: What did you do to try to get it?

A. I seen Mr. McAuley twice.

The Court: Where does he live?

A. He lives in Kansas, and I asked him for the contract and——

Mr. Currey: We object to the statement.

The Court: You sought to get the contract?

A. Yes, sir.

The Court: And couldn't get it, didn't get it?

A. No, he said he didn't have it.

The Court: Well needn't tell what he said.

Q. You were unable to get the contract?

Mr. Currey: We object.

The Court: That is not the way to prove the loss. You all will have to get that contract to prove the contents of it; this man says he made this development under McCullough under a written contract.

Q. Did I understand you contracted with McCullough or you contracted with Walker?

A. It was the contract from Mr. McCullough to me.

Q. And that is the one you turned to Walker?

A. Yes, sir.

Q. That was a contract for a lease? A. Yes, sir.

The Court: Proceed, gentlemen, you are too slow; we are not making any haste.

Q. How many holes were drilled on the land by Walker?

The Court: I will exclude all this evidence except with the promise you will produce that contract.

Mr. Towne: Well we will either produce it or show that we are unable when Mr. McCullough gets on the stand.

The Court: Well withdraw this witness then and proceed to make the contract.

Mr. Towne: Very well you may be excused for the present, Mr. Hopper.

Mr. Thompson: That is with the understanding if it stays in we may cross examine him.

The Court: Yes.

(Witness dismissed.)

W. P. McCULLOUGH, produced, sworn and examined as a witness for and on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Towne.

Q. State your name. A. W. P. McCullough.

Q. You are the plaintiff in this case?

Mr. Currey: We object to this witness testifying to any contracts or conversations with the deceased Leander J. Fish, or with reference to any transaction with Leander J. Fish, on the ground that one of the parties to this transaction is dead.

The Court: Very well, for the present it will be overruled.

Q. You are acquainted with Dallas Hopper the witness just on the stand? A. Yes, sir.

Q. You heard his testimony in regard to making a contract or having a contract for lease from you and turning that to Walker and some other associate? A. Yes, sir.

Q. State if you ever made any inquiry——

Mr. Currey: We object to his referring to any contract with Walker as leading and suggestive, not the proper way to prove it.

The Court: You must not ask leading questions.

Q. State what effort if any you ever made to get that contract from Walker. A. I asked Mr. Walker——

Q. And what success you had.

Mr. Currey: We object and move that the answer be stricken out.

The Court: That isn't the way to prove it. The only way is to get Walker and show it.

Mr. Towne: If we show the contract is lost and Walker didn't have it——

The Court: You can't show it that way; that is hearsay.

Mr. Towne: Then I don't know how we would be able to show it when Walker said he couldn't find it.

The Court: The way is to get Walker and get his evidence before this court; you can't prove what he said by what somebody else said; that is a violation of all rules of evidence.

Mr. Towne: I understand. Well of course if we have to produce Mr. Walker we will have to put in the other testimony and get him here tomorrow if we can get him at all. I doubt whether we can get him.

The Court: Well you can take his deposition can't you?

Mr. Towne: Well this matter probably can be straightened out.

Q. This contract Hopper had made with Walker did you later supplant that with another contract?

Mr. Currey: We object to that as leading and suggestive.

The Court: Yes, that is a leading question.

Mr. Currey: And asking for a conclusion.

The Court: Well you all will have to stand up when you address this court, this thing of sitting down and making objections is not proper. Now what was the question.

Mr. Towne: The question was, did you make a subsequent contract then with Walker and his associate?

The Court: That is not the way; if a contract was made with Walker who made it?

Q. Very well, state if you made with whom and who made it?

The Court: If there was such a contract.

A. Mr. Walker.

Mr. Currey: Wait a minute, if the contract was in writing they can produce the contract and identify it.

The Court: He didn't ask what was in it. You have to fix the contract before asking to introduce it. Go ahead.

A. Mr. Walker had been drilling on this land for some month and a half; he came down to the office one day and he and I were there and I asked him what kind of a contract——

Mr. Currey: We object to his asking.

Q. Just state what you did in regard to a contract.
A. We made a new contract.
Q. Now was that contract in writing? A. It was.
Q. Have you got that contract? A. Yes, sir.
Q. Produce it.

Mr. Ewert: Your honor, may we withdraw the witness for conference, please?

The Court: All right.

And thereupon the witness left the stand and consulted with his counsel and thereafter returned to the witness stand and the following proceedings were had:

Examination by Mr. Ewert.

Q. I show you Plaintiffs' Exhibit No. 3——

Mr. Currey: One or the other of these lawyers ought to do the examining.

Q. ——and ask you whether or not the lessee did anything on the land in the way of drilling under this contract?

Mr. Currey: I object to that as asking for a conclusion of the witness.

Mr. Thompson: And we object further, if your honor please, until this instrument is identified and offered so we may examine it.

The Court: Yes, I think so, the objection is sustained.

Q. I show you Plaintiffs' Exhibit No. 3 and ask you if that is your signature attached to it? A. Yes, sir.

Q. There appears to be some other writing underneath yours, what is that?

A. That is the signatures of the lessees or the parties to the contract.

Q. Is the circumstance under which it was executed——

Mr. Currey: Now we object to his stating any circumstances until we have a chance to examine it.

Mr. Ewert: Offer it in evidence.

Mr. Thompson: If the court please, we object to the introduction of this exhibit for the reason it is not the exhibit Mr. Hopper is testifying about, but is a contract executed by Mr. McCullough to other parties.

The Court: No they put him on here to show the contract under which this work was done.

Mr. Thompson: This contract, if the court please, was made in July, 1916; Mr. Hopper was testifying to work prior to that.

The Court: Yes, that won't do.

Mr. Ewert: Now may it please the court, we are offering in evidence Plaintiffs' Exhibit No. 3 and offer to prove that by reason of the terms of that contract for a mining lease that Walker——

Mr. Currey: Wait a moment.

Mr. Ewert: Let me make my offer. That under the terms of that lease a considerable amount of drilling was done on the lease in controversy. We further offer to show by this witness that prior to this time that these same persons were there by his consent and approval on this identical land and had done drilling prior to this time.

Mr. Currey: Now I object to the introduction of the offer and I want to object to the form of the offer in that it states they expect to show by this witness the statements that he had worked under the terms of this contract and

it is not competent and proper for a witness to state such facts.

The Court: He said he offered to prove. Go ahead and make your objection. I am not going to have any wrangling. Just go ahead and make your objection.

Mr. Currey: That is what I was trying to do.

The Court: Go ahead.

Mr. Currey: And also for the reason that the contract was made after the suit was filed and after the date, more than a year after the date, referred to by the witness Hopper.

The Court: Yes, I don't think it is competent here. The proof shows that the work done by Mr. McCullough by this man Hopper was under written contract and you haven't proven the loss of that contract yet, its execution and loss.

Mr. Ewert: Exception.

The Court: Very well.

Mr. Ewert: I would like to identify this map by the engineer. I want to identify it unless they will admit the blueprint is correct.

The Court: You may use it if you state you will afterwards prove that.

Q. Mr. McCullough, you are the plaintiff in this suit; will you examine the paper marked Plaintiff's Exhibit No. 4 and tell the court in your own language what if anything you did in the way of mining operations upon the lands here in controversy, when you begun and when you concluded up to the date of the filing of this bill?

A. We begun work by sinking first on the southeast of the northeast in the early part of May some time.

Q. What year?

A. 5th or 10th of May, 1915, and that shaft was sunk down something like thirty-two, three or four feet, I didn't measure it. In June we begun drilling number one; that hole was drilled by Mr. Hopper and Doan.

Q. How deep? A. That hole was put down 140 feet.

Q. All right, go on.

A. We kept on drilling during the month of July, August and September and we drilled hole No. 2, which is 225 feet. We drilled hole No. 3, 116 feet. Hole No. 4, drilled 176 feet. Hole No. 5—now those three holes were drilled by a man by the name of Hodges. Hole No. 5 was drilled 176 feet. Hole No. 6, 140 feet; hole No. 7 was drilled 154 feet; hole No. 8 was drilled by a man by the name of Steelman. Hole No. 9 was

drilled by Hopper and Carden, that was 164 feet—no, beg pardon, yes 164 feet; hole No. 10 drilled by Steelman and Hopper and Carden 154 feet; hole No. 11 by Steelman for Hopper and Carden drilled 143 feet.

The Court: Now who had this done?

A. That was done by Mr. Hopper my sublessee. Mr. Hopper was under me, he had a contract under me.

Mr. Currey: The contract is the best evidence.

The Court: I understand; he said he had a contract under him.

A. The contract was under me and J. P. McNaughton. Mr. McNaughton also had an interest in the lease he had acquired from Mr. Hopper. We were partners in the contract given to Hopper executed by Mr. McNaughton and myself. And the work done by Hopper at that time was under McNaughton and myself.

Mr. Currey: We object and move that the answer be stricken out as a conclusion.

The Court: He says they were working under him.

Mr. Ewert: Go on.

A. That is all the work we did up to the time McAuley.

Q. Was Mr. McAuley on this land doing this work with your knowledge and consent? A. Yes, sir.

Q. Did you see the drill rigs operating there? A. Yes, sir.

Q. Were you at that time——

The Court: Don't ask leading questions. Looks like we will have to run a law school here.

A. They had commenced drilling; they came into the office one day and was talking about a contract between them and Hopper, they weren't satisfied with the contract.

Mr. Currey: We object, immaterial.

The Court: Who came in?

A. Mr. McAuley and Hopper.

The Court: Well that is immaterial. If they did the work there and were working under him you want to ascertain who made the development, that is the proposition whether or not they were under them.

Q. Go on and tell what they did.

A. Well they went on drilling.

Q. When did they commence? A. Some time in June.

Q. What year? A. 1916.

Q. About what time?

A. Well seems to me something like 10th of June, I wouldn't say for sure.

Q. What did they do, go on.
A. They drilled three holes on the ground.
Q. How deep were those holes?
A. Their No. 1 was drilled to a depth of 302 feet.

Mr. Thompson: What time was that?

A. That was from June along to the last part of July or August.

Mr. Thompson: What year?

A. 1916.

The Court: You say this suit was filed in 1916.

Mr. Ewert: First day of July.

The Court: Was any drilling done on this 120 acres of land by anybody else other than those working under you prior to the time this suit was brought?

A. There was not.

Q. Have you now stated all the drilling and all the work that was done on these three forties in controversy up to the filing of this suit, July 1, 1916? A. Yes, sir.

Q. You heard the testimony of Mr. Hopper?
A. Yes, sir.

Mr. Ewert: That is all for the present.

The Court: Now I will state I am going to exclude all this evidence upon the part of Hopper; I think that the man Hopper may be permitted to swear that he, Hopper, executed the lease and that he filed it for record, that is an independent act of his own, but I will not allow him to testify any transaction he had with the dead man.

Mr. Ewert: To which the plaintiff asks and is allowed an exception.

The Court: Here is a decision by the Supreme Court of Oklahoma and that is binding on this court.

Mr. Ewert: What is the case?

The Court: Bell vs. Mills.

And thereupon court took a recess until two o'clock P. M.

And thereafter at two o'clock P. M. court reconvened pursuant to adjournment and the following proceedings were had:

W. P. McCULLOUGH, recalled for further examination testified as follows:

Cross Examination by Mr. Thompson.

Q. Mr. McCullough, what is your interest in this lease?
A. I have a three-sixteenths interest.

Q. Are all of the owners of this lease joined as plaintiffs?

Mr. Towne: We object to that as incompetent, irrelevant and immaterial. The fact if there is any such *was* acquired interest it has been acquired since the suit was commenced.

Mr. Thompson: Well I will confine it to that.

Mr. Towne: Not before the suit because it is immaterial.

Mr. Thompson: He has testified heretofore you had an interest and Mr. Ewert had an interest before the suit was filed.

The Court: Well you can ask him at the time this suit was instituted what interest he had.

Q. Mr. McCullough at the time this suit was filed what interest did you have in the lease as you claim?

A. I held all interests excepting two-fifths of twenty-seven thirty-seconds, one-eighth and one-thirty-second.

Q. What interest does that make you have?

A. That would have given me a little bit better than an undivided one-half interest.

Q. Didn't you testify in October or November, 1917, before Judge Campbell you owned three-sixteenths?

A. Yes, that I owned and still own three-sixteenths, undivided three-sixteenths at the present time.

Mr. Towne: We move to strike that out as immaterial.

The Court: He has a right to explain if he testified at that time. You say at the time the suit was brought you owned over a half interest?

A. Yes, I owned a little bit better than an undivided one-half interest.

The Court: At the time the suit was brought?

A. Yes.

Q. At the time you brought the suit did you and your associate plaintiffs own all of the interests of the Hopper lease?

A. Did we own all of the interests of the Hopper lease?

Q. Yes. A. Me and my associates?

Q. Mr. Beth, Mr. Phillips and yourself?

A. Yes, at that time. Now I would like to make an explanation along that line.

The Court: Well you can make any statement you want to. You say at the time the suit was brought you and your co-plaintiffs owned the entire interest. Now make your explanation.

A. Mr. Towne's and Mr. Ewert's interest in this suit is contingent upon the winning of the suit.

Q. And when did they acquire their interest?

A. Their interest has really not be acquired until the suit is either won or lost.

Q. Didn't you make an assignment of an interest in that lease?

A. Yes, but it was distinctly understood that their interest was contingent on the winning of this suit.

Q. Before you filed this suit you made a contingent assignment as you say? A. Yes.

Q. To Mr. Towne and Mr. Ewert in the Hopper lease?

A. Yes, sir

The Court: You mean a contract for a fee?

A. Well they have an interest you know; the fact of the matter is——

The Court: Interest in what is recovered?

A. In what is recovered. The fact of the matter is I wasn't financially able to carry this through and I gave Mr. Ewert and Mr. Towne an interest in this lease contingent on the winning of the suit.

Q. Now Mr. McCullough have you got a copy of that assignment and contract?

A. Yes I have but I haven't got it here.

Q. You live here in Muskogee? A. Yes, sir.

Q. Will you produce that here? A. Yes, sir.

Q. Bring it in the morning?

A. I think I have it, I am very certain.

Q. Mr. McCullough you stated in your petition in this suit that this lease was made to Dallas Hopper on April 29, 1912, and that the lessee immediately went into possession and did certain work by drilling and prospecting and so forth, now is that true?

A. What I mean is this, that he went into possession by paying his lieu money.

Q. Don't state that unless you know he did pay it, Mr. McCullough. A. Well, I am advised.

The Court: You are asking about the allegation which he made. I presume he swore to that petition and the only theory under which you could ask that would be to test his knowledge and credibility and he will be permitted to state why he made that allegation.

Q. Then you didn't mean, Mr. McCullough, that you did any mining, or your assignee did anything?

A. Not in 1912, no, sir.

Q. Did you in 1913? A. No, sir.

Q. Did Mr. Hopper do any in 1913? A. Not until 1915.

Q. In other words, you or your assignor Hopper never took possession or did anything under the terms of this lease in the way of work or mining until at least after the first of May, 1915?

A. We took possession by paying our lieu money under our contract.

Q. You don't know that was paid?

A. I am informed by reliable parties it was.

Mr. Thompson: I don't think the record should show that.

The Court: I think he should be permitted to say that in the state of the record. You asked him to explain. This don't go to prove that the lieu money was paid.

Q. Then Mr. McCullough——

The Court: I presume that was a question of law whether he was in possession or not. That don't prove anything.

Q. Mr. McCullough, I want to get you straight; prior to May, 1915, you don't claim, and it is a fact is it not, that Hopper or you or your associates or anybody acting for or under Hopper did any mining, attempted to do any mining?

The Court: Or in the actual state of possession.

A. Not until 1915.

Q. At least May 5, 1915? A. Not until 1915.

Q. As a matter of fact, it was about May 8, 1915, wasn't it, Mr. McCullough, when this possession you speak of commenced?

A. As well as I remember, it was in the very early days of May.

Q. And then was it you that took possession as you stated at that time?

A. Mr. Hopper was out there putting down a shaft.

Q. Now were you present?

A. I was present in just a day or two after he begun the shaft.

Q. State what you know about the first work that you and Mr. Hopper did.

A. I will just explain so we will get it, Mr. McAuley owned an interest in this lease as well as I did and we put Mr. Hopper out there to work.

Q. I wish you would confine yourself to what you know was done?

The Court: You say you were out there a day or

two afterwards. When you went out there what did you see?

A. They were sinking a shaft.

The Court: Who?

A. Dallas Hopper and some men.

The Court: How much had been done?

A. They had down five or six feet.

Q. What part of the land were they sinking on?

A. On the East Half of the Southeast Quarter of the Northeast Quarter.

Q. Prior to that time do you know whether there had been any drilling near that point or place?

A. There had been drilling——

Q. Of your own knowledge?

A. To my knowledge on the West Half of the Southeast Quarter of the Northeast Quarter.

Q. How far was that from where you started this shaft which had been sunk by Hopper?

A. A little bit better than a quarter of a mile.

The Court: Who did that?

A. Jim Pottorff.

Q. Do you know under what lease he drilled it?

A. Pottorff claimed to have sold to Wesley M. Smith.

Q. Do you know when that was drilled with reference to the Hopper work?

A. I think that was drilled in 1913 in the summer.

Q. That was prior to the time you saw Hopper working?

A. Yes, sir.

Q. You say you saw Hopper sinking a shaft and he was down five or six feet, at that time you were interested in the property?

A. I acquired my first interest as well as I remember on the 9th day of April, 1915.

Q. What did you pay Hopper for it?

Mr. Davenport: We object to that, if your honor please, incompetent, irrelevant and immaterial as to the consideration; if it was satisfactory to Hopper that would be immaterial.

The Court: They can bring it out. They can't take advantage of it.

Mr. Thompson: We are urging in our pleading that the suit was not in good faith and the lease was abandoned.

Q. What did you pay for the lease?

A. The interest I got from Hopper at that time as well as I remember was the undivided one-sixth interest and it cost me $200.00.

Q. Was that prior to the time McNaughton became interested? A. No, it was shortly after.

Q. Didn't you know at that time, Mr. McCullough, Hopper had given a two-thirds interest to McNaughton and his son for not to exceed five dollars.

Mr. Towne: We object to that and ask to strike it out as not evidence.

The Court: You say you don't know it of your own knowledge?

A. No, sir.

Q. You were out there the following day were you Mr. McCullough? A. I was out there looking after that.

Q. How deep did you sink that shaft?

A. As well as I remember, I am not sure, thirty-three or thirty-four feet.

Q. Did you find ore in that shaft? A. No.

Q. What did you do with it?

A. Abandoned the shaft and went to drilling, that is Mr. Hopper did.

Q. Was there ore in that shaft at that depth?

A. No, I don't suppose so.

Q. Then why did you sink it?

A. Mr. Hopper's idea was, he had done a great deal of work up here——

Mr. Thompson: Now we object to any idea of Mr. Hopper.

The Court: I didn't hear that, what was the question?

Mr. Thompson: I asked him why he was sinking a shaft in that locality and abandoning it at that depth; I asked him if there was no ore at that depth.

The Court: Go ahead.

A. Mr. Hopper having done some mining and having some interest in shallow mining, and on account of it being a sandstone formation he had got it into his head he ought to find a run of shallow ore at thirty-five or forty feet. I asked him why he sunk it there in that brake and that was his reason.

Q. Were you interested in that shaft sinking?

A. Yes, sir.

Q. You carried an interest with him? A. Yes, sir.

Q. How long were you in sinking that down to thirty-five feet?

A. I don't have any idea, Mr. Thompson, from the fact that I was very busy, I was simply paying my interest.

Q. As a matter of fact weren't you about a year there?

A. No, not that one place.

Q. Worked all winter didn't you? A. No.

Q. Well you abandoned that shaft then what did you do?

A. Begun drilling.

Q. Where did you drill with reference to this shaft?

A. With reference to the shaft?

Mr. Thompson: I will withdraw that question just a moment.

Q. When did you quit, as near as you can state, the sinking of that shaft?

A. I think some time in June as well as I remember, 1915.

Q. Then you commenced drilling? A. Yes, sir.

Q. Now where did you commence drilling with reference to this old shaft? A. South and east of the old shaft.

Q. How far?

A. Well it must have been 150 feet or something like that.

Q. Now Mr. McCullough you are referring to a memorandum, was that made at that time? A. How is that?

Q. Was that book you refer to made at the time?

A. No, sir.

Q. You made that recently?

A. I have made this in the last year or something like that, part of it.

Q. And you are testifying from that rather than your recollection?

A. I am testifying from that and the drilling of the holes.

Q. You are looking at the map, did you make that map?

A. No, sir, I didn't.

Q. Do you know that it is correct?

A. Well I don't know that it is correct other than the county surveyor made it.

Q. Where did he get the information?

A. He went out and made a survey.

Q. Well how deep did you sink that hole? A. 140 feet.

Q. Did you find anything? A. No, sir.

Q. How long were you drilling on that hole?

A. Well I couldn't say just how long on that one particular hole, not to exceed twenty-five or thirty days I wouldn't judge.

Q. Then you started another hole? A. Yes, sir.

Q. Within twenty-five or thirty days?

A. Yes, sir, something like that.

Q. And where did you drill it?

A. That was drilled almost directly west of the first hole I would judge that was 100 feet.

Q. 100 feet west you say of the first hole? A. Yes, sir.

Q. And when did you commence that?

A. That was commenced shortly after this hole was drilled by Mr. Cantrell.

Q. Now Mr. McCullough would you permit me to examine this memorandum you are testifying from? A. Yes, sir.

Q. And will you tell me when you made it? A. Yes, sir.

Q. When did you make this Mr. McCullough?

A. That has been made in the last month, something like that.

Q. This was made since you testified before Judge Campbell in the injunction matter?

A. Yes, in my testimony with Judge Campbell in the injunction matter you understand I was sick, I don't want to take any advantage but I was sick at that time, I hadn't the ability to get up my data.

Q. Well is this in your handwriting? A. Yes, sir.

Q. From what information, where did you get your information to put this down here?

A. Why the information as to who done the drilling was from the old contracts.

The Court: Where did you get that data?

A. Oh that was data I have had on hand ever since I taken charge of that suit.

Q. Where is your data you got this from?

A. Part is at the house and I got part from Mr. Hopper and part of it just recollection.

Mr. Thompson: If your honor please, we object to his testifying from this memorandum.

The Court: Yes, I don't think he can do that. You will have to testify from your distinct recollection.

Q. Now you started the second drill hole about 100 feet west of the first hole? A. Yes, sir.

Q. And about thirty days after you started the first hole?

A. Something like that, it may not have been more than twenty days.

Q. Now what did you find in that hole?

A. Didn't find anything except a few shines.

Q. And how deep did you drill?

A. That hole as well as I remember was about 130 some feet.

Q. How long were you drilling that?

A. I couldn't say, drilling a bunch of holes at that time.

Q. Who did? A. Mr. Hopper.

Q. Under your lease? A. Yes, sir.

Q. Drilling with more than one drill. A. No, sir.

Q. How many holes did you drill upon that land during the year 1915? A. I would say eight holes.

Q. Find any ore?

A. We found some in one hole a crevice.

Q. How much?

A. I think as well as I remember about twelve or fourteen feet.

Q. Do you remember about what depth?

A. 126 feet I think.

Q. Did you sink upon that?

A. No, they begun a shaft near that later on.

Q. At what time?

A. There was a shaft begun in June, 1916, as well as I remember.

Q. How deep did they sink it?

A. That shaft went sixty-four or sixty-five feet.

Q. That was on the southeast quarter of this land?

A. Southeast quarter of the northeast quarter.

Q. Did you sink it deeper? A. Sixty-three or four feet.

Q. Did you abandon it? A. No, sir.

Q. Why aren't you sinking it?

A. Well the reason it isn't being worked on now is on account of this injunction.

Q. As a matter of fact Judge Campbell enjoined the defendants from interfering with you on that forty? A. Yes, sir.

Q. Did that interfere with your——

Mr. Ewert: That line of questioning is objected to as incompetent, irrelevant and immaterial by reason of the fact under the terms of this lease at this time it is not necessary to prospect

The Court: Why?

Mr. Ewert: By reason of the fact, it isn't necessary as he subsequently gave this lease under which Smith is claiming and that absolved him from all liability the minute that Fish gave that lease.

The Court: Well go ahead.

Mr. Thompson: I want to show this side your honor please.

Mr. Ewert: Exception.

Q. Now why didn't you go ahead and develop that?

A. Well we had already found the ore, we have drilled several different holes there.

Q. Well you knew that did you not before you started sinking the shaft?

The Court: He has explained why he started sinking the shaft.

Q. This shaft sinking was done under Mr. Hopper?

The Court: He went over that.

Q. After you stopped sinking the shaft and drilled eight holes did you do any more drilling?

A. That is has there been any more drilling?

Q. Prior to the time you brought the suit.

A. No, I think just one hole.

Q. Then after the year 1915 you drilled one hole on this forty? A. No, after the year 1915——

The Court: Now you started there in 1915?

A. Yes, sir.

The Court: How many holes did you drill?

A. I think eight or nine in 1915.

The Court: How many did you drill in 1916?

A. 1916 we drilled——

The Court: Before the suit was filed along in the summer.

A. I think it was five holes.

Q. How many holes did you drill since the suit was filed?

A. Sixteen.

The Court: When was the last one drilled?

A. The last drilling was done in October, 1916, as well as I remember.

Q. Now that is covering the entire 120 acres?

A. Yes, sir.

Q. And have you done any further sinking Mr. McCullough than that you have testified? A. None whatever.

The Court: I believe the proof shows they are only permitted—that you are enjoined from everything except forty acres.

A. Forty acres.

Q. And that is where you found the only ore you found by reason of your drilling?

A. The only ore we found on the east half of the northwest.

Q. And you found that when?

A. Mr. Scott found that in the year 1916.

Q. At the time you went upon this property did you see any drilling on the Fish land?

A. No, sir, there was no operations at the time we took possession and no operation up to the time Mr. Scott had drilled.

Q. You didn't see them drilling? A. No, sir.

Q. You didn't see the Montreal drilling?

A. That wasn't on the land in question.

Mr. Ewert: That is objected to as incompetent for the reason the Montreal is not involved.

The Court: What is the object?

Mr. Thompson: If the court please Smith has a lease on the two hundred acre tract and it can hardly be disputed here but what he was drilling upon his lease; drilling on the Montreal would hold the entire lease. I want to show he was drilling in good faith.

The Court: Go on.

Mr. Ewert: May it please the court we want an objection that while the drilling on the Montreal might cause Smith to hold his lease with respect to his lessor, yet it has nothing whatever to do with this suit on this lease because we only have the three forty acre tracts.

The Court: Go ahead.

Mr. Ewert: We except.

Q. You saw drilling operations on the Montreal forty when you went there? A. Yes, sir.

Mr. Ewert: We object to that, not cross examination

The Court: Go on.

Mr. Ewert: Exception.

Q. What did you see how many drills?

A. I think I saw as high as two drills.

Q. At what time, when you went in possession?

A. Yes, when we taken possession of the 120 acres in question.

Q. They were drilling there right along all through the summer of 1915?

A. Yes, they drilled through the summer of 1915.

Q. And they did no drilling on the 120 acre tract?

A. No, sir.

Q. Nor during the year 1916 prior to bringing this suit?

A. I don't think so—I beg pardon at the time—well I don't know, I couldn't say for sure but I am informed at the time——

The Court: Well you can't testify about what you are informed.

Q. Well you don't want to say, Mr. McCullough, there had been no drilling on the 120 acre tract under the Smith lease?

The Court: Well he didn't know.

A. I know and still I don't know.

The Court: By hearsay; you don't know.

Q. Mr. McCullough I ask you to look at a paper which I have had marked for identification Defendant's Exhibit No. 1 and state whether or not that is your signature.

Mr. Towne: We object to that, not proper cross examination.

The Court: Your objection is overruled; he is a party to this suit.

A. It is my signature.

Mr. Ewert: Exception.

Mr. Thompson: I believe that is all if the court please.

The Court: You didn't introduce that?

Mr. Thompson: No, sir, not at this time.

The Court: Well when you introduce it they will have a right to recall him to cross examine him on it. Go ahead.

Redirect Examination by Mr. Towne.

Q. Mr. McCullough, since filing suit what development have you had done on the east eighty, northwest forty?

The Court: I brought that out; he testified to that.

A. I had three holes drilled under Mr. Scott.

Mr. Towne: I want to ask him about the ore that was found there.

The Court: Very well. What ore did you find there before this suit was filed?

A. I found no ore at all on the east half of the northwest, but I started sinking a shaft over there on the 22nd day of June, 1916, that was a shaft on the east half of the northwest; the second shaft was on the southeast of the northeast.

The Court: That is not that little shallow shaft?

A. No. I started sinking a shaft and we were run off.

The Court: Who run you off?

A. Mr. Smith run Mr. Hopper and my men off and placed a guard there.

The Court: When was that?

A. That was in June, 1916.

The Court: Before this suit was brought?

A. Yes, sir.

The Court: That was on what forty?

A. That would be on the northeast of the northwest; there is one forty lays east of the east half of the northwest and another forty lays off here.

The Court: What do you mean "off here"?

A. Off to the southeast, and they ran——

The Court: Well you testified they run you off.

A. Yes, sir.

The Court: Stop right there.

Mr. Thompson: Were you present, Mr. McCullough?

A. Oh, no.

Mr. Thompson: Then we move that be stricken.

The Court: That is stricken out on the ground of hearsay.

Q. What development if any did you do after that on the northwest? A. Northeast of the northwest?

Q. Yes.

A. Put down three holes; that is had three drill holes put down under Mr Scott.

The Court: Find any ore there?

A. Yes, sir.

The Court: What kind?

A. We got good ore at about one hundred twenty-eight or thirty feet, but it taken us a great while to get the drill rigs from the fact every time we tried to get a drill rig on the ground we were——

Mr. Currey: You are stating what you heard?

A. Not yet, we were met by Smith and his associates and weren't allowed to move our drill on the ground.

Mr. Currey: Were you there and seen any of those things?

A. I was one time.

Mr. Towne: You can cross examine him.

The Court: Go ahead.

A. That was the first trial I wasn't there but the second time they come to the ground——

Mr. Thompson: Your honor, he ought to designate.

The Court: Who do you mean by "they"?

A. That is the drill man.

Mr. Currey: Who was it?

A. I can't tell you what his name was.

Cross Examination by Mr. Currey.

Q. You don't even know who he was working under?

A. Let me make the explanation——

The Court: Well no explaining about it, was he there working?

A. He was there ready to work under Mr. Scott; they moved the drill up to the ground.

The Court: Who run you off?

A. Mr. Smith and his associates.

The Court: Who are Smith's associates?

A. Mr. Dyke and Mr. Smith was present one time.

The Court: He run you all off?

A. Wouldn't allow the drill man to go on the ground, threatened to blow up their rigs.

The Court: When was that?

A. That was in the last days of August, 1916.

Mr. Currey: Your honor, we move to strike that all out, being subsequent to the filing of this suit.

The Court: Well you all have asked him about development, I will overrule your objection.

Mr. Currey: Then we would like to be permitted to go into it on our side.

The Court: Very well you will be permitted to meet this evidence.

Q. Now go on and state what other development was done and what attempt if any was made to sink a shaft where this ore was discovered and what was the result.

Mr. Currey: We object to the question as leading.

Q. State what was done if anything.

The Court: Read the question. (Question read by the reporter.) Very well I will overrule the objection. Go ahead.

A. In October, 1917, we begun the sinking of a shaft on the northeast of the northwest and got the shaft down some seven or eight feet. Mr. Short was doing the work, the work was being done under me by Mr. Short. We had our machinery on the ground, had it cribbed up in good shape, and at the beginning Mr. Plumb or Mr. Wilkins they told me——

The Court: Just go on.

A. My men were arrested and taken off the ground and while they were taken off the ground the shaft was shot: it

seems shots were put in the four corners and it had been burned and our machinery all moved off the ground.

The Court: Do you know who moved it off?

A. Mr. Plumb told me——

The Court: Do you know of your own knowledge?

A. No, sir.

Mr. Davenport: Your honor, Mr. Plumb was at that time attempting to operate this lease under Smith.

The Court: I know but he is not a party.

Mr. Currey: Then we move to strike it out.

The Court: Anything that Plumb said will be excluded. Go ahead.

A. After they were arrested they were taken down to Miami and placed in jail and their bond made for them. Then come the time for hearing before the justice of the peace and the justice dismissed the case he had on account of not having jurisdiction.

The Court: Were they discharged?

A. They were discharged. Then I went and took possession again and they went and swore out warrants before the County Court or county judge and arrested Mr. Short and I went down to bail him out and they told me they had a warrant for me and I went down and gave bond.

The Court: When was that?

A. That was about the 17th day of October, 1916.

The Court: Did you ever attempt to do any development after then?

A. No, sir, because we were enjoined shortly after that.

The Court: This was land on which you were enjoined?

A. But it was prior to the injunction.

The Court: Go ahead.

Q. Now what did you have on hand in the way of equipment for the sinking of this shaft?

A. We had everything that was necessary; we had our boiler and our engine and everything just ready to put up at the time this was blown up, had it on the ground and was getting ready to build our derrick.

Q. What was the intention?

Mr. Currey: We object.

The Court: Never mind the intention, you judge the intention by what he did. Go ahead.

Q. What was the probable value of this machinery and what became of it?

Mr. Currey: We object to that, if the court please, he testified it was moved off.

The Court: He didn't testify he moved it off though the way I understood it. It seems somebody other than those working under him moved it off.

A. It was moved off and thrown over on the admiralty ground right across the street or section line.

Q. Was your equipment thrown——

The Court: Oh he has testified to this, no use repeating that, go ahead.

Recross Examination by Mr. Thompson.

Q. Mr. McCullough when did this happen?

A. As well as I remember 17th day of October, 1916.

The Court: He testified to that.

A. I beg pardon 1917.

Q. Prior to that time how long since there had been any drilling on that particular forty? A. In October, 1916.

Q. About a year; how many holes were drilled on there?

A. I drilled three holes.

Q. And in that interim had there been any drilling on this particular forty? A. Not by me.

The Court: Had anybody else?

A. Well I couldn't say, you understand, Mr Thompson, I wasn't here at that time.

Q. Well don't you know as a matter of fact there were two drills running on this ground from June, 1917?

A. There was two drills running on this ground?

The Court: On that forty.

A. Yes, sir.

Q. And hadn't they drilled something like eighteen holes since June? A. I couldn't say.

Q. And you went in there and started a shaft knowing that there were two drills operating there and had been for months?

Q. I knew they were at that time, I didn't know how long.

Q. How near did you start your shaft to where their drills were being operated? A. I think about sixty feet.

Q. Did you sink your shaft or start to sink your shaft near any hole you had drilled? A. Yes, sir.

Q. How near?

A. I suppose thirty feet from our middle hole that we drilled in 1916.

Q. Now that is on the forty we now know as the Quebec forty, it is west of the Montreal forty? A. Yes, sir.

Q. Then the only drilling you had done upon that forty since the time you had acquired an interest in the lease and prior to the time you say your shaft was destroyed you drilled three holes in 1916?

A. We drilled three holes. We couldn't keep drilling regularly on the ground.

Q. Now, Mr. McCullough, you knew when you did go on there other people were in possession and drilling?

A. I knew some one was drilling.

Q. And you didn't know who they were?

A. Well I didn't ask them any questions.

Q. You knew they were not drilling under your lease didn't you? A. Yes.

Q. And as a matter of fact didn't you take Mr. Davenport and go out there and attempt to take it by force?

A. No, sir, we went out there to put down a shaft, we didn't attempt to take anything by force; we just begun putting down the shaft.

Q. You knew Mr. Smith had warned you to keep away?

A. Yes, but we considered the lease belonged to us because our lease antedated Mr. Smith's.

Q. But you knew when you went down there you would meet force?

A. We didn't take that into consideration from the fact we considered the lease belonged to us because we took our lease six months before Mr. Smith took his.

Q. When you drilled on this forty in 1916 you knew Smith had drilled by his tenants or by himself upon this forty and was claiming it?

A. Not upon the forty. They had started to drill some line holes. There was one drill upon the Quebec—now let me see --whether they were on our forty or not I couldn't say but it occurs to me we gave Smith notice one time to vacate. Understand they didn't begin drilling on any of this 120 until we begun development, then they gave us notice to vacate; but in 1915 they started drilling some line holes and we gave them notice to vacate.

Q. When you speak of development you mean the sinking of these little shafts? A. I mean we were drilling.

Q. You never have developed a mine?

A. We never built any mills.

Q. Well have you sunk a shaft into the ore?

A. No from the fact we never found pay ore only on the northeast of the northwest where we were driven off.

Q. As a matter of fact at the time you took that it was purely speculative wasn't it?

Mr. Towne: I object to that as immaterial.

The Court: When you address the court you must get up in this court; this thing of sitting down and making objections those objections won't be put in the record.

Q. When you were prospecting there was no developed mine?

A. There was no developed mine but they were practically developed some pretty good stuff, that is doing a great deal of drilling.

Q. And you knew they had struck good ore on the Montreal forty about the 5th of May? A. No.

Q. You didn't know there was any strike there? A. No.

The Court: I think you have gone over this; if there is anything else.

Q. You testified about Mr. Smith running you and your drill man off repeatedly, how many times do you know that happened?

The Court: He said one time.

Q. Can you fix that time? A. I couldn't fix the date.

Q. What year? A. That was in 1916.

Q. After you filed this suit? A. In October, 1916.

Q. Who were the drill men that were with you, was Mr. Smith there? A. No, Mr. Dykes.

The Court: Didn't you testify Mr. Smith was there one time awhile ago?

A. Well if I said Smith I meant Dykes.

Mr. Thompson: Well we move to strike all that from the record. It doesn't appear that the defendant was there.

The Court: He can state who the people were that drove him off.

A. We never had got on the lease.

The Court: You say they were working on this eighty when you went out there to develop?

A. While we were working on this forty we were not particularly drove off but we were harrassed and told if we didn't get off——

Q. By whom? A. By Mr. Smith's associates.

The Court: Name them.

A. Dykes.

Q. Don't you know Mr. Dyke was not interested in that land?

A. Yes, but while he may not have been interested in the land he was interested in seeing us get off.

The Court: I will strike that out, but I will let him

show that they went out there and certain parties drove them off just a physical fact and he may give their names.

Mr. Thompson: We don't want the record to show Smith did it.

The Court: He has modified his testimony to say he was mistaken if he said Smith.

Examination by Mr. Currey.

Q. What is the name of the drill man that drilled the first three holes in 1916 after you commenced in 1915, what is that man's name? A. East half of the northwest?

Q. Anything on this 120 the first drilling you done out there? A. 1916?

Q. Whenever you went on there in May?

A. I think his name was Hardy.

Q. What is his first name? A. I couldn't tell you.

Q. Do you know where he is? A. No, sir.

(Witness dismissed.)

ADAM SCOTT, produced, sworn and examined as a witness for and on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Towne.

Q. State your name to the court. A. Adam Scott.

Q. Where do you live, Mr. Scott? A. I live in Joplin.

Q. What is your business? A. Mining.

Q. How long have you been engaged in the mining business?

A. I have been in the lead and zinc business about twenty-one years.

Q. Are you acquainted with Mr. McCullough the plaintiff in this case? A. Yes, sir.

Q. Do you know the land that is involved in this law suit, where it is located and the subdivision of it?

A. Yes, sir, pretty well.

Q. I will ask you to state if you ever did any drilling on any portion of this land, if so when and what you did.

A. I drilled on the northwest forty three holes pretty well to the east line.

Q. Who was you doing that drilling under?

A. Well, I had a contract from Mr. McCullough to drill and I hired a drill man and watched the drilling myself.

Q. What time did you go on that?

A. Well I commenced getting a drill about the middle of

July. They were very scarce and hard to get and the first drill I got was in August, the forepart of August, about the 10th.

Mr. Thompson: What year was that, Mr. Scott?

A. 1916. I had to send to Aurora, Missouri, to get that drill.

Q. How many holes did you drill?

A. Well that man didn't drill any. I showed him the place to drill and he moved in on that place and when I came back the next day he was moved out.

Q. Do you know why?

A. Why he told me, I can't tell that.

Q. Do you know why it was?

A. Yes, sir, he was run off.

The Court: Why do you say he was run off, did you see any evidence?

A. The drill was off the ground.

The Court: Where was the drill setting?

A. It was pulled in to the location I had located for him the day before and they caused him to pull out.

The Court: Where was the drill?

A. Just off the north side of the land.

Q. When did you next go on there if at all and what did you do?

A. Well I hired another drill man and got him to pull in there about a week after.

The Court: What year was this in?

A. 1916, in August. And he was stopped just before he got on the land.

The Court: How do you know he was, were you there?

A. I was there.

Q. Who stopped him?

A. Why Mr. Smith and Mr. Dike and Harry Wright.

Q. Well what happened?

A. He wouldn't go on any way. They made threats to him and he wouldn't go.

Q. State if after that you did any drilling?

A. Well I got another man and his drill. He was from Kentucky, he moved in there with a new drill and I brought him there and when he was right next to the corner Mr. Smith, Mr. Dike and Harry Wright, his foreman, came down and told the drill man that he musn't move in if they did they would attach his drill and make him a lot of trouble. I asked the man if he owed them anything. He said he didn't, never

seen them before. I says you are not trying to avoid any debts I don't think they can attach your machine; he said he would take a chance on it any way. Smith told me he hated to use physical force but he guessed he would have to do it. But this man pulled in and we drill one hole in the northeast corner of the forty west of the Montreal.

Q. That is the northeast of the northwest. Can you locate it on this map?

Mr. Thompson: Your honor, we don't object to the use of the map if it can be some way authenticated.

The Court: Have the map identified.

Mr. Towne: We haven't the surveyor here.

The Court: Well you can do it.

Q. Indicate on the map, Plaintiff's Exhibit No. 5, if you can where you did the drilling. A. This hole right here.

Q. How many holes did you drill?

The Court: The stenographer can't get that. The attorneys ought to help make the record.

A. Northeast corner of the northwest forty.

The Court: Marked number 17.

A. Yes, sir. That hole I drilled down to 171 feet. The next hole I finished I skipped to 16.

Q. You drilled that the second hole.

The Court: What date did you drill 17, about what time did you drill 17?

A. September.

The Court: What year?

A. 1916.

The Court: Now No. 16, what date did you drill that?

A. Drilled that on October first.

The Court: 1916?

A. 1916 to 200 feet, then I dropped back in the middle about half way between the two holes north of 16 and south of 17, drilled hole No. 15.

The Court: You drilled hole No. 15 there?

A. Yes, sir.

The Court: What date did you drill it?

A. October 9th, finished the hole October 9th.

The Court: What year?

A. 1916.

The Court: Did you drill any other hole?

A. No, sir.

Q. What depth was that hole, hole No. 15?

A. 15 was 186 feet and stopped in a crevice, they couldn't go any deeper.

Q. State the result of that drilling in regard to the discovery of ore.

Mr. Thompson: We object if the court please, "State what that drilling showed," unless this man has the best evidence the log itself.

The Court: Well if he knows, has had the experience and knows. He can't testify where he gets it from hearsay.

A. I was right there and watched very carefully. We got some good shines in the first hole, fairly good ore and that ground is full of crevices more so than our Joplin field. While it didn't show as rich ore as what would be called a rich hole I figured the ore would settle in these crevices and you couldn't get it out, the drill cuttings will show maybe fifteen per cent from the fact it settles in those crevices. That is the reason I wouldn't call that a pay hole. And the next hole had fairly good showings and the third hole got shines, lead and jack both and couldn't finish it, the crevice was so bad the hole would get crooked, had to leave it go without going as deep as I intended to go 200 feet.

Q. Well did you find paying ore in your judgment?

A. Well if there hadn't been any trouble about it I wouldn't have hesitated to sink a shaft knowing the character of the ground as I do.

Q. Just go on Mr. Scott and tell what you done after that.

A. Well I was continually harrassed with notices and threats to be put in jail the next morning by United States Marshals and all that sort of stuff.

Mr. Thompson: Now if the court please we ask that the witness confine this to some activity on the part of the defendant.

The Court: Yes, who threatened you?

A. Mr. Smith says, "I will have a United States Marshal here tomorrow morning and put you in jail.

Mr. Thompson: The United States Marshal didn't make any threat?

A. No, I didn't see him. I didn't go; says, I will be there and you will never get me in jail any younger, I never was in jail in my life. I went ahead and when I got this hole done I had got pretty tired and I went and got another lease. I didn't want to have to fight the mining game and have to fight to get the mine so I didn't do any more.

Mr. Towne: Cross examine.

Cross Examination by Mr. Thompson.

Q. Mr. Scott, when did you get an interest in this forty?

A. It was I think the 18th of July when I got my contract from McCullough.

Q. What year? A. 1916.

Q. And how soon did you got to work upon it?

A. Just as soon as I could get a drill, the 10th of August.

Q. Did you have a log made of these holes?

A. I kept a memorandum in this book, I can tear them out but they will get lost.

Q. That is a book you kept at that time? A. Yes, sir.

Q. I wish you would let me see it please, sir.

A. Yes, sir, here it is.

Q. Now the book showing the logs of these holes didn't show anything other than shines?

A. No, sir, I didn't call it anything but shines is my recollection.

Q. And what time did you turn that property back to Mr. McCullough? A. I don't remember.

Q. Well with reference to the time you quit drilling?

A. It was some time that fall I think or that summer; I didn't right away.

Q. Didn't you quit Mr. Scott because you didn't find anything? A. No, that wasn't it.

Q. You went on there knowing it was in litigation at that time, McCullough had brought a suit at that time?

A. Well I heard something about that; that was something I didn't know about until I run up against this trouble.

Q. You knew it at the time, Mr. Smith told you about it?

A. Why he claimed he had a lease on the land, and I says I have a contract for lease.

Q. That is the time he told you he thought he would have to use force? A. Yes, sir.

Q. And you went on? A. Yes, sir.

Q. What force did he use?

A. He didn't use any, just threats.

Q. And after drilling the three holes he threatened service of notice upon you from the United States Marshal and have you arrested and you quit?

A. It was during the time I was drilling there.

Q. Did you think it had sufficient prospects to sink upon?

A. Not with the trouble that was had.

Q. Have you any interest in the property now?

A. No, sir.

Q. Do you know what was done upon the property after you quit by McCullough? A. I only heard.

Q. How many times did Smith threaten to have you arrested? A. Just the one time.

Q. That is when you went on?

A. When I was going on. He said, "If you go on there I will have the United States Marshal out here in the morning and take you to jail."

Q. And that didn't happen? A. No, sir.

Q. And after drilling the three holes you got discouraged about the title and quit?

A. Well I figured I couldn't afford to fight and go to the expense of sinking a shaft not knowing whether I would get my lease in the end.

Q. But you did go to the expense of drilling three holes?

A. Yes, sir.

Q. And he made no other threats after you went on?

A. He served two or three written notices about getting off the ground.

Q. You didn't pay any attention to them did you?

A. No, I didn't pay any attention.

Redirect Examination by Mr. Towne.

Q. He asked you the question if it wasn't on account of not finding ore that you quit, what was the reason you quit?

The Court: He has testified that. Stand aside.

(Witness dismissed.)

C. E. BIDWELL, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Towne.

Q. State your name to the court. A. C. E. Bidwell.

Q. What is your business? A. Civil Engineer.

Q. Where do you live? A. Miami.

Q. I hand you Plaintiff's Exhibit No. 5: I will ask you who made that map? A. I made the map.

Q. Is it correct? A. It is true and accurate.

Q. Showing the location of the holes and the numbers?

A. Showing the location of the holes and shafts and outside boundaries.

Mr. Towne: That is all.

Cross Examination by Mr. Thompson.

Q. Are you deputy surveyor? A. I was at that time.

Q. You live there now do you? A. Yes, sir.

Q. Is this your work? A. Yes, sir.

Q. As I understand you this was made after you surveyed that land? A. What did you say?

Q. I understand you made this from your notes after surveying the land? A. Yes, sir.

Q. And this correctly shows all of the drillings on the lands described here? A. Yes, sir, at that time.

Q. When was this made? A. May 3, 1918.

Q. It is dated May 2, 1918. I think you must be mistaken about that. A. In what way?

Q. You didn't make any attempt to show the drillings on the other tracts?

A. No, sir, except the three holes in the east half of the northwest.

Q. And you did that work for whom?

A. W. P. McCullough.

Q. You just make a showing of the drilling they had done?

A. Made a showing of the drilling on the southeast of the northeast.

Q. And three holes up there?

A. Yes, sir. There were other holes in that.

The Court: When did you make this?

A. May 2nd.

Q. But you were instructed not to show all drillings?

A. I was instructed only to show those three holes.

Q. You think that is substantially correct as you had been instructed to do? A. Yes, sir.

Mr. Thompson: I believe that is all.

(Witness dismissed.)

Mr. Towne: We offer the map in evidence.

J. C. WILLUM, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Towne.

Q. State your name to the court. A. J. C. Willum.

Q. Where do you live, Mr. Willum?

A. Miami, Oklahoma.

Q. What is your business?

A. I am in the concrete business.

Q. Are you acquainted with one Dallas Hopper?

A. Yes, sir.

Q. Were you acquainted with Leander J. Fish during his lifetime? A. Yes, sir, slightly.

Q. Did you know where this allotment of his was located?

A. No, sir, not exactly, I don't remember being on the land.

The Court: There is no evidence in here of any payment of this rental. Unless you all have witnesses outside of this witness.

Mr. Ewert: We are ready to argue that when the time comes.

The Court: If you are not going to introduce it we will argue it right now. We will not make all this record.

Mr. Towne: We have some corroborative testimony of the payment. Mr. Willum wanted to go on that train.

The Court: I will give you time to get them here as far as that is concerned. I will continue the case. But if you haven't got a case there is no use taking up the time of the court to try it. Under this authority of the Supreme Court of Oklahoma it seems to settle that that the assignor can't testify, the assignor of a lease, he isn't a party to it. Go ahead.

Q. I will hand you Exhibit No. 1, a lease purporting to have been executed by Leander J. Fish to Hopper, and ask you if you were one of the subscribing witnesses to that instrument. A. Yes, sir.

Q. Now what was the date of that, Mr. Willum?

A. April.

The Court: April what year?

A. 1912.

Q. What time of day did you sign the lease as a witness?

A. My recollection the forenoon.

Q. Who was present when you signed that lease?

A. Mr. Hopper and Mr. Fish and myself and M. Duffy.

Q. Any other subscribing witness? A. No, sir.

Q. You didn't understand me, any other subscribing witness but you? A. No, sir, besides Mr. Duffy and myself.

Q. Did you see Fish sign this lease? A. Yes, sir.

Q. See Mr. Hopper sign it? A. Yes, sir.

Q. Who took the acknowledgment? A. Mr. O. B. Ballard.

Q. Was the lease read over to them? A. Yes, sir.

Q. Did you see the lease delivered to Mr. Hopper?

A. Yes, sir.

Q. State who was present when that was delivered.

A. Mr. Duffy, myself, Mr. Ballard and Mr. Fish.

Q. Do you know whether it was delivered with Mr. Fish's consent or not?

Mr. Thompson: We object to that question as leading.

The Court: Who delivered it to him?

A. Mr. Ballard, O. B. Ballard.

The Court: Mr. Fish was standing there?

A. Yes, sir.

The Court: How close to him.

A. Well he was sitting in a chair right close by.

The Court: Any objection made by anyone there as to Mr. Ballard turning the lease over?

A. Not to my recollection.

The Court: Go ahead.

Q. Was there anything said about any other consideration other than what was mentioned in the lease?

Mr. Thompson: If the court please we object to that question as leading and suggestive; he should ask what was said and done and not suggest the answer.

Mr. Towne: You set up they agreed to give $60.00 bonus and the lease was left in escrow and it was agreed to get the signature of some fellow on a note.

Mr. Thompson: I am objecting to the manner of questioning.

The Court: State what was said there if you remember.

A. There wasn't any consideration mentioned except stipulated in the lease.

Q. What happened after the lease was delivered to Hopper? A. Hopper took it and went out.

Q. What did Fish do? A. He got up and went out too.

Q. Had you talked to Fish about leasing this land or had he talked to you about leasing it?

Mr. Thompson: We object to that as incompetent, irrelevant and immaterial.

The Court: What is the question?

Mr. Towne: I asked him if he had ever talked to Fish or Fish talked to him about leasing this land.

The Court: What is the purpose.

Mr. Towne: To show he tried to lease it to him on the same terms.

Mr. Thompson: I don't think that is competent.

The Court: I don't think that is competent. He testified Fish understood the terms and the terms were set out and considered. Why do you want to build up on that?

Mr. Towne: Because of the fact that they allege this other contract and it would infer if he was trying to get

a bonus out of this man he would have tried to get one out of Willum.

The Court: I will not let you testify.

Mr. Towne: We don't want to recall Mr. Willum, he would like to go home.

The Court: Well let him testify. Overrule the objection.

Q. I will ask you to state.

A. Yes, sir, about the first of March and during March.

Q. What year? A. In 1912.

Q. Go on.

A. He wanted me to lease it, go in with Mr. Hopper; he was talking with Hopper several days before he finally took this lease and he wanted me to put up some money and go in with Hopper and prospect this lease.

Q. Well in what way?

A. He wanted me to give him some money to show I would go to work and had an interest in the lease.

Q. For the purpose of development?

A. Yes, sir, he said he could develop.

The Court: He wanted you to go in with Hopper?

A. Yes, sir.

The Court: Be a partner with Hopper in taking the lease?

A. Yes, sir.

Q. Did he demand of you or request of you anything in addition to what the lease provided as royalty?

A. Yes, sir, he wanted me to pay him twenty dollars.

Q. But there was nothing said about the signature of anybody on a note?

Mr. Thompson: We object to that.

The Court: I don't see how that could be competent.

Mr. Towne: Very well.

The Court: You say this lease was read over to Fish in your presence?

A. Yes, sir.

The Court: He signed this contract after it was read over to both of them?

A. Yes, sir.

Mr. Towne: Cross examine.

Cross Examination by Mr. Thompson.

Q. What did they say in your presence Mr. Willum after you went in what was said by Fish and what was said by Hopper?

A. Proceeded to make up the lease.

Q. What was said?

A. Said they were ready to execute the lease.

Q. That was the first thing you heard when you went in?

A. Yes, sir.

Q. And you went in with Hopper?

A. Fish was with us.

Q. Said what? A. He was ready to execute this lease.

Q. Who did they tell that to? A. Mr. Ballard.

Q. And Hopper was there was he? A. Yes, sir.

Q. And what did he say about the consideration?

A. Well he said he was ready to proceed with the lease. Mr. Ballard began writing out the lease.

Q. Well didn't they have some agreement with reference to securing a team of horses and an endorsement for Fish at the bank?

A. That was written in the lease and Mr. Ballard read it to Fish.

Q. What was? A. The stipulation.

Q. What did you hear about it?

A. That is all I heard what was in the lease.

Q. Do I understand that stipulation was written in the lease? A. The terms of the lease were read in my presence.

The Court: Did you hear anything about a pair of horses?

A. No, sir.

The Court: Didn't hear anything like that?

A. No, sir, not in my presence.

Q. Well didn't they have an agreement to that effect?

A. No, not that I know of.

Q. Don't you know they went down to Forrest Rawlings to see a team of horses? A. No, sir.

Q. And don't you know that Mr. Wagner was to endorse the paper of Fish at the bank to buy this team? A. No, sir.

Q. You and Hopper considered going into this lease together? A. That was some time before this lease was executed.

Q. How long? A. Must have been a month.

Q. What year was this executed?

A. 1912, I think it was in March, 1912.

Q. That is when they talked to you? A. Yes, sir.

Q. And he wanted you to take a lease and put up the money for development? A. Yes, sir.

Q. That is what Fish wanted was development of his ground? A. Why it is what he was after.

Q. That is what he wanted you for?

A. He asked me to take an interest; I suppose that was what it was for.

Q. How much did he ask you to put up for development?

A. He didn't say. He just said he would give me a lease.

Q Was there any money paid Fish there? A. No.

Mr. Thompson: I believe that is all.

Redirect Examination by Mr Towne.

Q. Was there any agreement to leave this lease with anybody?

Mr. Thompson: We object, leading.

A. No, sir, not in the conversation with me and Fish.

Q. At the time this lease was executed was there any development close to this land?

The Court: Oh that is immaterial. Stand aside.

(Witness dismissed.)

A. C. JONES, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Ewert.

Q. State your name and residence.

A. A. C. Jones, Miami, Oklahoma.

Q. How long have you lived there?

A. About fifteen years.

Q. Were you acquainted with Leander J. Fish in his lifetime? A. Yes, sir.

Q. Did you ever hear any conversation between Leander J. Fish and Dallas Hopper relative to a certain mining lease?

A. Yes, sir.

Q. When and where?

A. It was in Ben Dardeen's pool hall.

Q. When? A. 1912 I think it was.

Q. What month? A. In April.

Q. What was said between them?

A. Well I was in the pool hall and they asked me to stay in the pool hall while they went down to the notary public to draw up a lease on Fish's land given to Hopper.

Q. What was said between the two men if anything at that time?

A. Well there wasn't much said at that time then.

Q. Did you hear a later conversation between the two men? A. No, sir, I talked to Mr. Fish after the lease.

Q. What did he say?

A. Well, they went out and went down to Ballard's and Fish he came back up in a little while and I asked where Hopper was, he asked me to stay in the hall until he come back. He says—I says, did you get your lease fixed up? He says, "Yes, sir." I say, where is Hopper? He says, "He taken the papers and went to the court house."

Q. Did you hear any later conversation?

A. One other time I did, yes, sir.

Q. When? A. That was in May.

Q. Where? A. In the pool hall.

Q. What was said?

A. Fish come in there and asked Hopper to pay him some money.

Q. Just state the conversation.

A. Well he told him he wanted to get some money and Hopper says, "I haven't any money right now, Jack." He says, "I just want a little." Dallas says, "How much?" And he says, "Three dollars." And he gave him this money, and he says, "Jack, I have over paid you now," And he says, "I will fix that with you."

The Court: Who was he calling Jack?

A. Fish.

Q. Is that all that was said? A. Yes, sir.

Q. Any reference made to a mining lease at that time?

Mr. Thompson: We object, leading.

A. I said they was getting up a mining lease. He had given the mining lease and he come in and wanted some more money and Dallas——

Mr. Thompson: We object, the witness is not stating any conversation.

The Court: State what was said as near as you can.

Q. This was in what month? A. May.

Q. What year? A. 1912.

The Court: Now what did he say, just give the conversation, you say Jack Fish came in?

A. Yes, sir.

The Court: And wanted some money?

A. Yes, sir.

The Court: Why did he say he wanted the money?

A. Rental on his lease.

The Court: And what was said to him?

A. Dallas told him he didn't have any money. Well he said he just wanted a little; Dallas asked how much, and he said three dollars; Dallas gave him three dollars and says, "I have overpaid you now."

The Court: What did Fish say to that?

A. Well he says, "I will make it all right with you."

Mr. Ewert: Take the witness.

Cross Examination by Mr. Thompson.

Q. When was this first conversation you detailed that you heard between them? A. In April.

Q. What year? A. 1912.

Q. About what month?

A. It was along about the last of the month.

Q. How long before this next conversation?

A. About two weeks.

Q. What conversation did you hear that first conversation, I wish you would just state what was said and by whom.

A. All I heard they asked me to stay there.

Q. Who asked you, name the parties, and tell what conversation you heard. A. Hopper and Fish.

Q. Did they both speak at the same time? A. No, sir.

Q. Then state the conversation as you remember it.

A. I did say Hopper and Fish was in there and was talking at the counter.

Q. State what they said.

A. I was sitting back in the hall and Dallas called me up and wanted to know if I would stay in the pool hall him and Fish was going down to make a lease. I says I don't know whether I have time or not I haven't much time to fool around here. Fish says, "We won't be gone but a little bit, we are just going down to O. B. Ballard's."

Q. Is that all?

A. Fish he came back up there and I asked him where Dallas was, and he said he had gone to the court house; and I asked if he had his papers fixed up all right and he said he did.

Q. Was that all the conversation? A. Yes, sir.

Q. Did you see the lease? A. No, sir, never did.

Q. Now within two weeks you say Fish came in again?

A. Yes, sir.

Q. What did he say then?

A. Asked Hopper for some money.

Q. Well what did he say?

A. He come in and asked Dallas for some money and Dallas told him he didn't have any money. Well he says, "I just wanted a little." Dallas says, "How much?" And he said

three dollars, and he told Fish then, "I have overpaid you, Jack." And he says, "Well I will make it all right with you."

Q. You have stated all you heard at that time?

A. That is all I heard at that time, yes, sir.

Mr. Ewert: Now that question is objected to.

The Court: Oh, I understand that. The witness means all that he remembers.

Mr. Ewert: The Circuit Court of Appeals has held to the contrary. We got caught on that once.

The Court: Is that what you mean; he didn't say anything else?

A. No, sir, not as I recollect of now.

The Court: It has been seven years since that conversation.

A. Sir?

The Court: It has been nearly seven years since that conversation?

A. Yes, sir.

Q. Do you remember ever seeing Jack Fish since that time in there with Hopper?

A. I have seen him in there several times.

Q. You can remember and fix the days approximately seven years back? A. No, sir.

Q. But you do know it was 1913 or 1912?

A. I know it was 1912 because I went to Peoria to work in June.

Q. Were you working in the pool hall at that time?

A. No; sir.

Q. Hopper was? A. Yes, sir.

Mr. Thompson: I believe that is all.

Mr. Ewert: That is all.

(Witness dismissed.)

J. P. McNAUGHTON, produced, sworn and examined as a witness for and on behalf of the plaintiff testified as follows:

Direct Examination by Mr. Towne.

Q. State your name to the court. A. J. P. McNaughton.

Q. Where do you live? A. Miami, Oklahoma.

Q. What business are you in Mr. McNaughton?

A. Well, I am farming now, have some mining leases.

Q. How long have you lived at Miami or in that country?

A. Well I have been in the country since '77.

Q. Were you acquainted with Leander J. Fish during his lifetime? A. Yes, sir.

Q. How long have you known Mr. Fish?

A. I have known him since '81; '80 I met him first.

Q. Are you acquainted with Dallas Hopper?

A. Yes, sir.

Q. And W. P. McCullough? A. Yes, sir.

Q. Have you had some connections or interests with this lease? A. Yes, sir.

Q. Just tell the court when you had that interest and at what date?

A. My son and I bought two-thirds interest in this in April, 1915.

Q. That wasn't given to you but you bought it.

A. No, sir.

Q. What did you pay for it?

A. $250.00 apiece; my son paid 250 and I paid 200 at that time and 50 afterwards.

Q. In May, 1915? A. I think it was April.

Q. May 5, 1915, was there any development on this 120 acres of land up to that time? A. No, sir.

Q. What was the first development in the way of drilling or prospecting put on that land under the McCullough lease or Hopper lease?

A. Well if I remember it commenced in May sometime.

The Court: What year?

A. 1915.

The Court: Had there been any development made on that 120 acres of land prior to that time?

A. No, sir, none that I know of.

The Court: Well you had been over it?

A. Well I had been over it some yes, sir, I don't think there was any development at all, none that I know of.

Q. What was the first development done?

A. Why Mr. Hopper commenced a shaft on the Southeast of the Northeast of 32.

Q. Following that what was done?

A. Then he done some drilling.

Q. Do you know how much?

A. No, I couldn't say how much drilling he did do.

Q. Did you later on transfer your interest to McCullough?

A. Yes, sir.

Q. What time was that?

A. That was in June, about a year I think sometime in June, 1916.

Q. That was just before the suit was brought?

A. Yes, sir.

Q. At the time the suit was brought was there anybody in possession of that land? A. Yes, sir.

Mr. Currey: We object to that as stating a conclusion.

Q. I will ask it in this way: what if anything was McCullough or his associates doing at the time on the land?

A. They were drilling and sinking a shaft.

Q. Do you remember about the time this lease was made to Hopper? A. Yes, I do something about it.

Q. Did you have any conversation with Fish about it shortly after it was made? A. Yes, sir.

Q. About how long after?

A. Well, I couldn't say just how long.

Q. Well approximately? A. Short time, a few days.

Q. What did he say if anything?

A. He said that he had leased his land; he had been trying to lease it to me, but he had leased it to Dallas Hopper.

Q. Did he say under what conditions he leased it?

A. No, I didn't ask him about the particulars.

Q. He had tried to lease the land to you prior to the time he leased to Hopper? A. Yes, sir.

Q. Under what terms and conditions did he offer it to you?

Mr. Thompson: Object to the question as being incompetent.

The Court: I think that is immaterial.

Mr. Towne: I believe that is all.

Cross Examination by Mr. Thompson.

Q. Mr. McNaughton, you are quite familiar with that Fish land and have been for a number of years?

A. I have known the country there since I have been in the country, yes, sir.

Q. Driven over it a great many times haven't you?

A. Yes, sir.

Q. Do you know whether there had been any drilling prior to May, 1915? A. No, sir, I do not.

Q. Well, do you know that there was not any drilling?

A. Well, I couldn't say; I didn't have any interest and didn't look for any.

The Court: After you went in yourself, after you took an interest you could tell whether it had been drilled?

A. Oh, sure. I bought this interest then I went over it.

The Court: From that examination can't you tell whether or not there had been any?

A. I don't remember any drilling done on the land at all, but immediately around it it was developed.

Q. There had been drilling. Now this land in question how does it lay, this 120 acres, what part of the Fish allotment did you become interested in?

A. In the East half of the Northwest of Section 32 and the Southeast of the Northeast.

Q. There was a forty laying in between there?

A. Yes, sir.

Q. On the south tier of forties? A. Yes, sir.

Q. And you didn't acquire any interest in that forty?

A. No, sir.

Q. There had not been any drilling done on that forty at the time you acquired your interest?

A. Not that I know of. It seems to me Fish told me there had been a well.

Q. As a matter of fact hadn't they drilled all through the summer of 1913 on the Pottorff? A. Not that I know of.

Q. Five, six or ten holes? A. Not that I know of.

Q. You went over the ground? A. No.

Q. Did you go across this forty?

A. I don't remember any drilling.

Q. I am speaking of the forty in between your tracts, the forty with the little house on it.

A. Well you see Mr. Pottorff I believe there was some drilling done there, yes, sir.

Q. Do you know about how much? A. No, sir.

Q. You didn't mean to say that that drilling hadn't been done?

A. No, I wouldn't say; I think there had been some possibly done there.

The Court: Was that on this 120 acres?

A. No, sir.

Q. At the time you acquired your interest was there any drilling on the Montreal forty? A. I believe there was.

Q. Do you know how much? A. I couldn't say.

Q. Do you suppose there had been thirty holes drilled?

A. Well I don't know.

Q. There had been a great number?

A. I couldn't say how many holes.

Q. But you did know they were drilling? A. Yes, sir.

Q. And you knew they had had a strike there when you acquired your interest? A. Yes.

Q. Mr. McNaughton, isn't it a fact you and Ray, your son, acquired this lease, two-thirds interest, for $5.00?

A. $5.00?

Q. Yes.

A. I remember very well that Ray paid him $250.00 I paid him 200, which was all I had at the time, and paid him 50 after.
Q. You are quite sure of that? A. Yes, sir.
Q. What became of your interest?
A. I sold my interest to Mr. McCullough and Ray also.
Q. That was just before the suit was brought?
A. Yes, sir.
Q. What did you get for it?
A. I realized about $5,000 Ray and I together.
Q. How did you get that?
A. Part in money and some other leases that Mr. McCullough had in lieu of that.
Q. That was in June, 1916? A. Yes, sir.

Mr. Thompson: I believe that is all.

Mr. Towne: That is all.

(Witness dismissed)

Mr. Ewert: Recall Dallas Hopper for a predicate.

DALLAS HOPPER, being recalled, testified as follows:

Direct Examination by Mr. Ewert:

Q. Mr. Hopper how long had you known Leander J. Fish prior to the execution of the lease Plaintiff's Exhibit #1?
A. About a year.
Q. How frequently did you see him during that time?
A. Well, I seen him quite often.
Q. Well how many times had you seen him prior to the execution of this lease?

The Court: What is the object of this?

Mr. Ewert: I wish to show Fish knew Hopper and Hopper knew Fish for a year prior and knew the circumstances.

Mr. Thompson: We admit that they were acquainted.

Mr. Currey: But we object to his giving any testimony whatever bearing on this transaction.

Mr. Ewert: I cautioned him not to say a word about any conversation.

Q. How often did you see him?
A. Probably thirty or forty times.
Q. Did you have conversations with him? A. Yes, sir.
Q. Visit with him? A. Yes, sir.
Q. Where did the conversations occur?

Mr. Thompson: We object, leading.

The Court: Whereabouts did you live?

A. I lived in Miami.

The Court: Where did Fish live?

A. Well he did part of the time and part of the time out on his allotment and different places but he was in town every few days.

Q. State where you met him at these different times or he met you?

The Court: Oh, I think that is immaterial.

Q. I show you a paper marked Plaintiff's Exhibit #6——

Mr. Ewert: The purpose of the testimony is to show he knew the man and knew him well

Q. I show you a paper marked Plaintiff's Exhibit #6 and ask you if you have seen that paper before? A. Yes, sir.

Q. When and where?

Mr. Currey: We want to know what the paper is before he answers that question.

The Court: He can state where and when.

A. Mr. Smith gave it to me along in June sometime.

Q. Do you know what year? A. 1912.

Mr. Ewert: Offer it in evidence.

The Court: You say that was the year you got the lease?

A. Yes, sir.

The Court: June of that year?

A. June of that year.

Mr. Currey: I don't think the witness means that, not at the time you got the lease?

The Court: He swore June, 1912, then I asked this to bring it to his attention; he says he gave it to him the year he got the lease.

Q. Will you examine that again and refresh your recollection; what do you now say?

The Court: What year did you get that in?

A. In 1912.

The Court: Why was Smith serving notice on your in 1912?

A. I never looked at the dates.

Q. You just now read it.

The Court: It says May 31, 1915.

A. Well, that is my error in making that mistake; it was just after we commenced work. Yes, it was in 1915.

Mr. Ewert: Offer it in evidence.

Mr. Thompson: No objection.

Mr. Ewert: Take the witness.

Cross Examination by Mr. Thompson.

Q. Where were you Mr. Hopper when this was delivered to you? A. I was at home.

Q. I am now referring to Plaintiff's Exhibit #6. In Miami? A. The same notice?

Q. Yes.

The Court: Where were you when that was served?

A. I was at home on the Fish allotment.

Q. You lived on the Fish allotment? A. Yes, sir.

Q. How long have you lived there?

A. I moved there May 8, 1915.

Q. That is the first time you ever got on the Fish land?

A. First time I ever resided on the Fish land.

Q. Have you resided there ever since? A. Yes, sir.

Q. By permission of anybody?

A. No, sir, under the lease I have.

Q. You moved out across the line?

A. It is setting across the forty line, part on the Fish lease and part on the Cardin.

Q. And you have been notified by the administratrix to get off of that land several times?

Mr. Ewert: That is objected to as incompetent, immaterial, not within the issues here, not proper cross examination.

Q. Do you pay any rent for this house? A. No, sir.

Q. Mr. Hopper, this notice was served upon you right after you moved on there?

A. It was quite a little bit after I moved there, probably thirty days, something like that.

Q. Who delivered it to you?

A. Mr. Smith and Mrs. Wills.

Mr. Thompson: That is all.

Mr. Ewert: That is all.

(Witness dismissed)

J. C. BRIGGS, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Towne:

Q. State your name to the court. A. J. C. Briggs.
Q. Where do you live Mr. Briggs? A. Miami.
Q. What is your business? A. County clerk.
Q. How long have you lived in Miami?
A. Twenty-three years most of the time.
Q. Are you acquainted with W. P. McCullough?
A. Yes, sir.
Q. Are you acquainted with Dallas Hopper? A. Yes, sir.
Q. Were you acquainted with Leander J. Fish during his lifetime? A. Yes, sir.
Q. Do you know where this land is, this Hopper lease, involved in this law suit? A. Yes, sir.
Q. Did you ever have any interest in that law suit?
A. Yes, sir.
Q. When?
A. Acquired one-thirty-second April 10th, April 15th, I acquired two-thirty-seconds.
Q. What time?
A. April 10th and April 15th, I believe it was the contracts were made.
Q. Do you know what time development was commenced on that land? A. In April, 1915.

The Court: Is he a party?

Mr. Towne: No, sir.

The Court: Well, go ahead.

A. I only had my interest fifteen or twenty days.
Q. Now Mr. Briggs did you examine this land about that time?
A. Yes, sir, sometime after April 15th.
Q. You have no interest in the land now?
A. I have an interest I purchased two years ago from Hopper if he got a lease. He got a lease or contract and I purchased an eighth royalty interest on his lease.
Q. But when this suit was filed you had no interest ?
A. No.
Q. You had assigned your interest to him? A. Yes, sir.

The Court: Who to?

A. Mr. McCullough.
Q. Going back to the time you became interested in it or about that time or shortly after that did you examine this land?
A. Yes, sir.

Q. Did you see where any developments had been made?

A. About four or five days after I purchased the last interest I think it was the first Saturday, I purchased the last interest the 15th of April.

The Court: What year?

A. April, 1915, and went out there in a few days.

Q. Tell the court what if anything was on this land in the way of development at that time.

A. Well, there wasn't a thing in the way of development except an old well Mr. Hopper told us about, but as far as any drilling there wasn't anything on there.

The Court: Did you examine it to see?

A. Yes, sir.

The Court: You say there had been no drill holes?

A. I didn't find any, we took a taxi and were out there a couple of hours and I didn't find any at all, not on the 120.

Q. There is a forty acres lease between part of this lease?

A. West half of the Northwest.

Q. A portion of that land what mill is located on there now? A. Yes, sir.

Q. What mill? A. Montreal if I am not mistaken.

Q. That eighty was also a part of the Fish allotment?

A. Yes, sir.

Q. What development did they do while you had any interest in it if any?

A. I sold out; I says, Bill if you will take this off of my hands I will let you have it. He says all right.

Q. Do you know of any development in the spring and summer of 1916?

A. Dallas came in every few days for his money and I think they had a drill out there. I couldn't go out you see I couldn't know.

The Court: You don't know of your own knowledge?

A. Not of my own knowledge.

Cross Examination by Mr. Thompson.

Q. What did you pay for your interest?

A. $100 for a twelfth and 50 for two-thirty-seconds.

Q. From whom did you buy? A. Dallas Hopper.

Q. And to whom did you sell? A. McCullough.

Q. What did you get for it?

A. I made it to him for the same thing I paid.

Q. You knew Smith was claiming an interest?

A. After that I did. I didn't figure he had any lease on

account of the record. I didn't know anything about the law. I supposed the first man had the lease.

Q. At that time you were register of deeds?

A. Yes, I was deputy county clerk.

Q. Mr. McCullough was register of deeds?

A. He was county clerk.

Q. And he had looked the record over? A. Yes, sir.

Q. You knew Smith had a lease?

A. His wasn't any good because it was considered a lap-lease.

Q. You knew of his lease?

A. I knew of it, but everybody knows a lap-lease is no good.

Q. Mr. Briggs did you drive all over this land?

A. Most all over.

Q. How did you go?

A. Went over in a car and walked over part.

Q. Did you walk across this forty between your two tracts?

A. I don't remember whether we walked or drove.

Q. Did you see any indication of drilling on that forty?

A. I think they were drilling on the west half. All I was interested in was 120 acres.

Q. You say there was quite a bit of work upon the Montreal?

A. There was work but everything was secret, you couldn't find for love or money what was in the drill holes.

Q. You saw them drilling? A. Yes, sir.

Q. And that is where the Montreal mill is? A. Yes, sir.

Q. And the Quebec mine was there? A. Yes, sir.

Q. Is it producing ore?

A. I haven't been there recently.

Q. You don't know anything about what McCullough did with reference to development? A. No.

Q. But you are quite sure there had been nothing done under your lease prior to the time you secured it?

A. I only had it a short time, about fifteen days, maybe not that long.

(Witness dismissed)

THOMAS H. WILLIAMS, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Towne.

Q. State your name to the court. A. Sir?

Q. State your name to the court.

A. Thomas H. Williams.
Q. Where do you live? A. Oklahoma City.
Q. Where did you live prior to that?
A. Baxter Springs, Kansas.
Q. How recently did you move from Baxter?
A. About three weeks ago.
Q. Are you acquainted with this Fish land that is involved in this law suit?
A. Only with the section that I have leased.
Q. What portion of that is that?
A. I will read it to you; I don't remember from memory, E/2 of the SE/4 of the NE/4.
Q. You have the East twenty acres of the Southeast of the Northeast? A. I presume so.
Q. When did you make that lease?
A. Why I first bought out Sturgeon and Sheets in September, 1917.
Q. Have you a written lease? A. Yes, sir.
Q. Have you got it with you?
A. Not that lease I haven't, but I afterwards made a lease on January——
Q. I mean the lease that you operated under?
A. Yes, sir, I have that lease.
Q. Let me have that please. You say you acquired this lease in September, 1917?
A. No, I got that lease about December 20th, this lease you are now looking at.
Q. What development if any did you do under that lease?
A. I drilled five holes under that lease.

The Court: Who did he get his lease from?

Mr. Towne: From McCullough and his associates; I will introduce the lease.

The Court: Go ahead. Now that was in the fall of 1917?

A. That was on January—about December 20th when I got this lease here.

The Court: 1917?

A. 1918.
Q. And you drilled five holes; can you tell now the approximate depth of those holes?
A. The approximate depth would be about 170 feet.
Q. What if anything did you find or discover in the hole in the way of ore?

Mr. Thompson: Now if the court please we object to this question and the answer to it, not the best evidence.

The Court: If he knows of his own knowledge he may testify to it.

Q. I will ask if you superintended the drilling and was present when it was going on? A. Yes, sir.

Q. Do you know what the holes showed?

A. They didn't show anything to amount to anything.

Q. Tell the court whether you discovered anything in the holes in the way of ore to justify the sinking of a shaft and the building of a mill. A. No, sir.

Q. I will ask you if you had a contract whereby you had bought a mill to put on this land in case you found ore?

A. I had arranged to get a mill, yes, sir.

Q. Have you got that contract with you? A. Yes, sir.

Q. Now Mr. Williams, in regard to the five holes you drilled what was the date of the last one that you drilled?

Mr. Thompson: Mr. Williams is that a book that you made a record in at that time?

A. No, sir, this is just a memorandum book that I copied from my record.

Mr. Thompson: You just recently made that memorandum?

A. Yes, sir. I thought I would want some notes as a witness and I made these notes.

Mr. Thompson: And your testimony is based upon information as shown on that book?

A. Well this book is made from the records that I have at home.

Mr. Thompson: I don't think the witness ought to be allowed to testify from that if your honor please.

The Court: If he copied a record and he knows it is made accurately I think he could. He would have to go to the original record he made at the time. What did you make that memorandum from?

A. I made it, your honor, from a little book, I have the original book, of these holes.

The Court: When you sank those holes did you put down what you found?

A. Yes, sir.

The Court: Why didn't you bring the original book?

A. Well, I didn't think it was necessary; I just made a rough sketch of what I might need here.

The Court: I believe he will have to testify from his own recollection.

Q. Give the date as near as you can when you drilled the last hole. A. About the latter part of June, 1919.

Q. What year did you say?

A. I started to drill about the 18th of January, 1918.

The Court: Now when did you stop drilling?

A. Then I stopped drilling about the latter part of June, 1918.

Q. Now have you done any work on there since that in any other way?

A. Yes, I have been sinking that shaft.

The Court: You say you are sinking a shaft on this twenty now?

A. No, but I have up to a month ago.

The Court: I thought you said it didn't justify.

A. Well I thought I had to do some work to keep my lease in force until the result of this suit and I was holding my lease with a view if they had a title to this lease I proposed to go back and do the necessary development.

The Court: Test out the entirety?

A. Test out the entire twenty acres.

Mr. Towne: We offer in evidence this lease Plaintiff's Exhibit No. 7 and also Plaintiff's Exhibit No. 8.

The Court: Very well. Take the witness.

Cross Examination by Mr. Thompson.

Q. Mr. Williams how deep have you sunk this shaft you speak of? A. I think it is about forty-five feet.

Q. That is on the southeast quarter?

A. That is on this lease. I am not very well posted on the description. It is about the middle of the southeast quarter.

Q. Is there any other shaft? A. Yes, an old shaft.

Q. How deep is it?

A. Well I really don't know, but I would think 38 or 40 feet.

Q. There are just the two on that forty?

A. That is on the twenty, not on the forty; I don't know anything at all about the other twenty.

Q. Which side of the little creek is that shaft you are sinking? A. I am on the south side.

The Court: South and east?

A. South and east.

Q. How deep have you sunk the shaft, I mean by your own work? A. About ten or twelve feet.

Q. And how long were you doing that?

A. Oh possibly since I quit there in the latter part of June.
Q. 1918? A. 1918.
Q. How long did you work at sinking that ten feet?
A. All that time.
Q. That is since the last of June? A. Yes.
Q. You worked six or eight months in sinking ten feet?
A. Yes.
Q. Who told you to do that? A. Nobody, I told myself.
Q. Are you in rock?
A. Yes, sir, the hardest kind of rock.
Q. And you don't know of any ore around there?
A. I don't quite understand.
Q. Do you know of any strike in the immediate vicinity of that shaft? A. There are different operations.
Q. I mean on this twenty either direction? A. No, sir.
Q. They why are you sinking the shaft?
A. To hold this lease.
Q. And you are quite sure you have sunk at least ten feet since last June? A. I think so.
Q. Why did you quit?
A. Well I quit because I didn't deem it worth while.
Q. You have thought you have no lease? A. No, sir.
Q. Then there is no work on that forty at this time?
A. I don't know about the forty.
Q. Well I mean the twenty.
A. Not as far as I am concerned.
Q. Do you mean Mr. Williams that you have done the work or you hired it done? A. I hired it done.
Q. And you paid for it? A. Yes, sir.
Q. And who did the work? A. Mr. Hopper.
Q. How much did you pay him?
A. At first $25.00 a month.
Q. For sinking the shaft?
A. For keeping my lease in operation.
Q. Is that the average wage for sinking shafts in that district? A. I don't know.
Q. Did he do the work in the shaft?
A. He agreed to, yes, sir.
Q. Well did he do it? A. I presume so.
Q. I understand you are swearing you had sunk this shaft ten feet. A. Yes.
Q. Do you know that you did? A. I presume.
Q. Have you seen it since last June?
A. Yes, sir, three or four times.
Q. And you saw it being sunk? A. Yes, sir.
Q. And Hopper was doing it?
A. Mr. Hopper was working on the shaft.

Q. And in your judgment was he sinking there at the time? A. He was taking water out when I was there.

Q. And that was about forty feet deep? A. I assume.

Q. Is that the shaft McCullough said they sank to sixty feet? A. I presume not; I don't know, I presume not.

Q. Isn't it a fact, Mr. Williams, you are paying Hopper $25.00 a month just to live on the place and hold possession?

A. No, he agreed to do some work on the shaft for me.

Q. Did he do any other work that you know of?

A. I don't know.

Q. Well was he at the time you employed him?

A. That I don't know.

Q. You bought his whole working time did you not?

A. No, I agreed to pay him $25.00 a month to work on the shaft and hold possession for me on the lease.

Mr. Thompson: That is all.

(Witness dismissed.)

WILLIAM LUTHER, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Towne.

Q. State your name to the court. A. William Luther.

Q. Where do you live? A. Douthat, Oklahoma.

Q. Do you know where the Fish land is located, Leander J. Fish, the Montreal Mill? A. Yes.

Q. Well Douthat is the town, explain to me, Douthat is the town where this mine is located?

A. Douthat is on the Douthat land across the street from the Fish land.

Q. How long have you known this locality?

A. I don't know exactly, ever since the town started.

Q. How many years? A. Two or three.

Q. Do you know Mr. Smith the defendant in this suit?

A. Yes, sir.

Q. Do you know Dallas Hopper? A. Yes, sir.

Q. I will ask if you were ever in the employ of Mr. Smith for any purpose? A. Yes, sir.

Q. State to the court what it was?

A. Well I was employed by Smith to guard a piece of land down there.

Q. Well *the* the court what land it was if you know; was it this Fish land that is involved in this law suit?

A. Well, I understood that it was.

Q. State what you did under your employment and what your instruction was from Smith.

A. My instruction was from Smith if Dallas Hopper came down there to tell him to stay off of there.

Q. Any further instruction in case he didn't stay off?

A. Well not exactly instruction, I wouldn't consider it that way.

The Court: Well what did he say?

A. Dallas Hopper was coming down there with some tools; Smith was present at the time and Smith told me to tell him to stay off and when he come down we told him but he went on just the same.

Q. What was Dallas Hopper attempting to do?

A. He was starting a hole.

Q. What do you mean, mining shaft?

A. Shaft I suppose.

Q. Did Smith arm you or request you to go down there armed?

A. No, we let him go on down there and didn't bother him. I told him to stay off and so did Smith. We didn't harm him in any way, but looked like we was going to have to if we kept him off, but we didn't do it.

Q. Was that all Smith said to you about it?

A. Yes, about all I guess.

Q. Did he instruct you to use any force to put him off if necessary? Just tell the court what was said about that?

A. Well I believe there was something about using force or looking like we was going to have to. Of course a fellow that way watching anything naturally supposes they would use force, but we didn't use any force in keeping him off.

Q. Did you have any arms of any kind, any guns?

A. Had a hammer handle or pick handle.

The Court: Who had that?

A. I think Smith had it when he first came down there and he gave it to me and I threw it down on the ground and we left it there.

Q. How long did you guard this property?

A. One day and one night.

Mr. Towne: I believe that is all.

Cross Examination by Mr. Thompson.

Q. Do you know what year this was, Luther?

A. I don't remember.

Mr. Towne: Just one question. Was that the land immediately west of the Montreal mine? A. Yes, sir.

Mr. Towne: That is all.

Q. You don't know the year? A. No, sir.

Q. Was the Montreal Mill up?

A. The Montreal Mill was up I believe and running, but it was very new.

Q. And this was the land immediately west? A. Yes, sir.

Q. Now, Luther, what did Hopper have when he came down there to go on there?

A. Oh I don't know just exactly, he had a pick and shovel or some few instruments for digging purposes.

Q. He had some stakes?

A. Stakes, lumber or something.

Q. Had some stakes and staked out a shaft?

A. I don't know what they were.

Q. Well, he went on did he? A. Yes, sir.

Q. Did you see a knife there that day? A. No, sir.

Q. Didn't see Hopper have a knife? A. No, sir.

Q. Do you know how long he stayed there? A. No, sir.

Q. As a matter of fact didn't he sink a shaft two or three feet and quit then?

A. Well he had sunk a shaft before I went down there.

Q. Do you know about how deep?

A. Five or six, four or five, something like that.

Q. Do you know whether he afterwards sunk it any deeper? A. Not that I know of; I don't believe that he did.

Redirect Examination by Mr. Towne.

Q. What did you do or Smith if anything in regard to this shaft? A. What did I do?

Q. Yes, or Smith. A. I filled the shaft up.

Q. Did you do that under Smith's instructions?

A. Yes, sir.

Recross Examination by Mr. Thompson.

Q. But that was after Hopper had quit, Hopper wasn't there was he?

A. We filled that shaft up before Hopper came down there.

Q. He had been on there before and sunk a shaft a few feet deed?

The Court: You mean he was off, he had gone?

A. Yes, sir, he had gone.

The Court: He was living up there then wasn't he?

A. Well I understand that Hopper lived in the vicinity, but I don't know just where.

Q. Were you there when Hopper and Mr. Large had some difficulty? A. No, sir.

Q. On this same tract? A. No, sir.

Mr. Towne: Did you fill it up more than once?

A. Just one time.

(Witness dismissed.)

And thereupon court took a recess until the following morning.

And thereafter and on April 19, 1919, at ten o'clock A. M., court reconvened pursuant to adjournment and the following proceedings were had:

J. A. WILSON, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Ewert.

Q. State your full name. A. J. A. Wilson.

Q. Your residence. A. St. Louis, Oklahoma.

Q. Business? A. Miner.

Q. Are you familiar with the location of that forty of the Fish land lying directly west of the Montreal forty known as the Quebec forty? A. Yes, sir.

Q. Did you ever do any work on that ground?

A. Yes, sir.

Q. State under whose direction and when and where.

A. Well under McCullough's direction October about the 10th, 1917, we went there.

Q. Who hired you, employed you? A. McCullough.

Q. Who else if any one? A. Well Short and McCullough.

Q. What is the first name of Short, Jess? A. Yes, sir.

Q. And W. P. McCullough plaintiff in this suit?

A. Yes, sir.

Q. Tell the court what you did on that date?

A. We had been working for probably five or six hours at the place we was at and he said he had another place he would take us.

Q. Tell what you did on this particular land.

A. Well we went down there and started a shaft.

The Court: When was that?

A. 10th of October, 1917.

Q. What did you do, go on and tell the court just what you did on that shaft.

A. We started the shaft and worked till noon and got our dinner and went back and along in the evening Mr. Plumb——

Q. How many days did you work?

A. That was the first evening.

Q. How deep was the shaft at the time you are relating now?

A. It was that evening; we hadn't got it down but probably three feet at the time they come and ordered us to quit.

Q. Who came?

A. Why Mr. Plumb and a gentleman by the name of Wilkins.

Mr. Ewert: Now may it be admitted that Wilkinson and Plumb were at that time lessees through Smith and the Church-Mabin Mining Company?

Mr. Thompson: On this particular forty?

Mr. Ewert: On this particular forty.

Mr. Thompson: That is true.

The Court: On October 17th the said Plumb and said Wilkins were lessees of the defendant Smith on which forty?

Mr. Ewert: Quebec forty right west of the Montreal Mine.

Mr. Thompson: Of course the admission is that they were working under the Smith lease, they didn't have a lease from Smith but under the Church-Mabin Mining Company.

A. They wanted to know what we was doing; told them sinking a shaft; and they wanted to know under who; and we told them Mr. McCullough. So they ordered us to stop and we talked it over awhile and then they went on off.

Q. Just say what they said to you and what you said to them and when you say "they" which one.

A. Mr. Wilkins said, "You fellows are in bad." And I said we didn't think so. They ordered us to stop and we didn't stop and they went over to a couple of drills and come back and ordered us again, and we didn't do it. And they said as soon as those boys leave fill up the shaft. So then they got a little fellow called Shorty to fill the shaft up.

Mr. Thompson: Was that in your presence?

A. Yes, sir. The drill boys and all come back together and they told him, "As soon as they leave you fill that up." Well of course we lived there and didn't leave and so they never filled it and they went on and we never saw them any for three days. And they came back and said, "I see you boys are still with us."

Q. Who do you mean?

A. Wilkins and Plumb. Says, "You are still with us." Says, yes, I believe we are going to stay. And then they never said any more until we went home Saturday and come back

Sunday evening I think Monday evening they come back in the morning and served a notice on us to vacate.

Q. I show you an instrument marked Plaintiff's Exhibit No. 9 and ask you if that is the notice you say they served on you at that time? A. Yes, sir.

Q. I notice the name, "Ed Perry, Constable." Who served it on you? A. Mr. Perry.

Q. State whether or not there was any one else present, if so who?

A. There was no one else only Mr. Plumb and Mr. Wilkins were with him.

Mr. Ewert: Plaintiff's Exhibit A is offered in evidence.

Mr. Thompson: Now if the court please we object to the evidence of this witness as to the statements made by Plumb and Wilkins in the absence of Smith; there is no evidence Smith was a party to it.

The Court: Any statement they made there would not bind Smith.

Mr. Thompson: And we move to strike out that part of the testimony and object to this exhibit for the same reason.

Mr. Ewert: Now it has been admitted that Wilkins and Plumb were acting as sublessees through Smith.

The Court: What was it they said to you?

A. They served that notice on us.

The Court: What did they say, what was it he testified they said?

Mr. Thompson: He testified, if the court please, Plumb and Wilkins come down there and told them they were in bad and told them they wanted them to get off and told somebody to fill up the shaft, but don't connect Smith.

The Court: You admitted they were working for Smith.

Mr. Thompson: As a sub-tenant under Smith, but I don't think that could be charged against Smith.

Mr. Ewert: They have admitted Wilkins and Plumb held under the Smith lease first to Church and Mabon.

The Court: I think this is competent. They were in possession under him. Any evidence tending to show that they kept these people out would be competent to show they hadn't abandoned it. I think that is competent.

Mr. Thompson: Exception.

Mr. Ewert: Plaintiff offers Plaintiff's Exhibit No. 9, being a notice addressed to Jesse M. Short, George Short, J. A. Wilson, V. Swineheart, A. C. Towne, Paul Ewert, W. P. McCullough and their agents and servants, in effect telling them that they were in wrongful possession.

Mr. Thompson: We object to stating what is in the instrument.

The Court: Yes, the notice stands for itself. Whose name is signed to it?

Mr. Ewert: Signed Edward Weekum, C. H. Plumb, E. R. McClelland.

The Court: Very well.

Q. What else did they say? A. Well they left.

Q. This was what hour of the day?

A. Well about eleven the best I remember. We sat around the tent and didn't do anything, and I went up and got some stuff for dinner and so while I was gone up there Mr. Wilkins and Plumb came back and I met them leaving going back to town and they said they didn't want to cause us any trouble.

Q. Who was working with you?

A. Swineheart. They advised us to leave. They said, "Are you going to leave?" And I said, hell no we are not going to leave, we are going to get our dinner, and I says come on back and take lunch with us. So they went on off. The next I seen I believe was Ed Perry. I went after a bucket of water and Mr. Perry had went in the tent and sat down.

Q. Where was this tent? A. About twenty feet away.

Q. It was your own tent? A. Yes, sir.

Q. Living in it?

A. Yes, sir. Mr. Perry went in there and says, "How would you like to go to Miami?" And I says, I don't give a damn where we go if the right fellow is here to take us. So I went in there and he said he had a warrant for me, and I said read it. I says that is all right let's take a drink, so we got a drink of water I brought. Then we went out and started and I says. I hate to walk; and he says you have a car let's ride, and I says the car is broke down: and we went up to the justice of the peace.

Q. Where? A. At Douthat.

Q. That is about how far from where the shaft was?

A. About half a mile.

Q. Go on.

A. So we went on up there and Mr. Wilkins and Plumb was sitting out to the west of the justice's office in their car, and when we drove up they left; and then we *wen* in and made

bond and they turned us loose. And I said I have to hurry up back and get to work. And the judge says, "No, you can't go back down there until after you have your trial."

Q. Were Plumb and Wilkins present?

A. No, they had gone, I saw them a few minutes afterwards.

Mr. Currey: Is that the constable's statement?

Mr. Ewert: Justice's statement.

Mr. Thompson: Your honor it seems to me that is incompetent.

The Court: Yes, that may be excluded. You may state whether or not you went back.

A. Well, it kind of made a believer of me and I didn't, but I went down where I could look across.

Q. What did you see?

A. Well saw the shaft burning and our stuff laying in the road.

Q. Who was there at that time?

A. I didn't know the names. There was quite a crowd, I wasn't close enough to tell.

Q. Could you distinguish whether Plumb and Wilkins were there?

A. Their car was setting in the road and they were back a little ways coming to their car.

Q. Did you afterwards go down to the shaft?

A. No, not that evening.

Q. How deep was the shaft at the time this incident occurred?

A. Well from the top where we had cribbed down to the bottom something like nine feet the best I remember, between eight and nine.

Q. And you had you say cribbed, what do you mean by that? A. Timbered.

Q. You timbered the shaft down nine feet?

A. Yes, sir; that is we had built it up a little above the top of the ground.

Q. Did you see Plumb and Wilkins when they left the justice of the peace's office? A. Yes, sir.

Q. Did they have anything with them?

A. Seemed like they had a can setting on the side of the car and I just saw them turn around and leave.

Q. When did you next go to the shaft?

A. I forget the date the trial was set for and we was there and it was continued.

Q. How many days afterwards and when?

A. Seems to me it was set on the 17th.

Q. Now you were up at the justice of the peace's office and you say you looked down there and saw the shaft burning?

A. I wasn't at the justice of the peace; after we gave bond and they started with the other two boys to Miami I walked down where I could look across quite aways from the shaft and it was burning. That evening we went back and our tent was out in the road.

Q. What condition did you find the shaft in that evening?

A. We wasn't over to the shaft that evening.

Q. Well when did you go?

A. After the justice had dismissed the case against us.

Q. How many days after that?

A. I couldn't say exactly.

Q. About? A. It seems to me like five or six days.

Q. What condition did you find the shaft in when you did go there?

A. Well it was filled up, the cribbing burned out and filled up.

Q. What equipment did you have?

A. Boiler and hoister and engine.

Q. Tell the court what that equipment is for, sinking a shaft? A. Yes, sir.

Q. What do you mean by boiler?

A. Make steam to run the hoister and blower.

Q. State then what happened.

A. We went to cleaning out, started right in to work again, and hadn't been working long until the sheriff came with a warrant for Mr. Short. Mr. McCullough was there himself and he told him he had a warrant for him and they went off. I worked until quitting time and then we taken a notion we had better go down and see if we couldn't get George out of jail.

The Court: Who was George?

A. George Short, brother of Jess Short; so we went to Miami to the sheriff's office and Mr. McCullough went with me and asked if George was in there. He says "Yes, sir, we also have a warrant for you and Mr. Wilson."

Mr. Thompson: We object.

The Court: What were the warrants for?

Mr. Thompson: I think we can show this by an admission that the county had them arrested on a charge of unlawful entry upon premises peaceably in possession of another person.

The Court: Who filed the suit?

Mr. Thompson: I think Mr. Plumb.

The Court: Very well, I think that is competent.

Mr. Thompson: As to what the sheriff said and what Short told him at the court house?

The Court: Yes, that is not competent. You will admit for the purpose of shortening this record that they were arrested for going on these premises?

Mr. Thompson: Yes.

The Court: And that it was done at the instance of Mr. Plumb?

Mr. Thompson: Yes, but not at the instance of Smith.

Mr. Currey: But we reserve the right to strike the evidence for the reason the admission shows that Plumb and Wilkins were the immediate lessees of Mabon and Church and Mabon and Church the lessees of Smith and there is no privity of estate or contract between the sub-lessees and the original landlord.

The Court: Very well that will be overruled. If Smith went and put these people in possession so they could obstruct these people from making improvement under their lease then that is evidence as to whether or not they abandoned their lease.

Mr. Thompson: We will move to strike all the testimony of this witness for the reason he is testifying to an occurrence that happened more than a year after this suit was filed.

The Court: Well I may exclude it all on final consideration of the case but I will let it in. Go ahead.

Q. All right, did they put you in jail?

The Court: No, that is immaterial.

Q. Then what did you do?

A. Well, Mr. Freeman said the warrant is not here.

The Court: No, when you got out of jail where did you go?

A. They didn't get me in. They happened to be too slow to catch me.

The Court: Where did you go.

A. I went home to Joplin.

The Court: Did you ever go back out there to work?

A. They got a temporary injunction and then I went back and cleaned the shaft out and built a derrick.

Q. That is the plaintiffs got a temporary injunction?

A. Yes, sir.

Mr. Thompson: I don't hardly think that is true. You got a restraining order.

The Court: Well, the ordinary witness calls them the same thing.

Q. That is all you know is it? A. That is about all.

Mr. Ewert: Take the witness.

Cross Examination by Mr. Thompson.

Q. Mr. Wilson that all occurred in October, 1917, you have been testifying about? A. October, 1917.

Q. And you did the first work in the first shaft that was done? A. This one shaft, yes, sir.

Q. And what was there upon that forty when you went to work there with reference to development?

A. There was two drills setting there.

Q. Working? A. One was.

Q. Well did only one work while you were there?

A. That first time; they were making repairs on one of them.

Q. Where were you working before you went on there, close by? A. No, sir.

Q. You don't know about the condition of the property before that time? A. Never saw it until we went there that morning.

Q. How deep did you get that shaft sunk?

A. The best I remember it was nine feet.

Q. Who employed you? A. W. P. McCullough.

Q. Did he tell you in going on there what you might meet with?

A. It seems he told us they might order us off. He went with us and showed us where he wanted it sunk.

Q. Was that the time Mr. Davenport was with you?

A. He was there the second time when we came clear at the justice of the peace.

Q. And Mr. Plumb and some of his people were trying to keep you from coming back? A. Yes, sir.

Q. And weren't you then advised to go on and use such force as necessary to go on?

A. Mr. Davenport was with us and seems like he said that he didn't want to see no killing over that or something he said if it was him he would fight them like gentlemen.

Q. Do you know what he meant by that? A. No.

Q. But you went on and you have told about what happened? A. Yes, sir.

Q. And that was all in October, 1917? A. I believe.

Mr. Thompson: That is all if the court please.

(Witness dismissed)

Mr. Thompson: Now at this time, if the court please, we move to strike from the testimony all the testimony of this witness for the reason it is incompetent, irrelevant and immaterial.

The Court: It is your contention in the trial of this case that the question of the development of this lease after the suit was brought is not pertinent to the issue.

Mr. Thompson: Well we have been contending that, but if the court please they have been permitted to go ahead and we have been saving our objection.

The Court: Well, I want to know what your contention is.

Mr. Currey: In regard to the testimony subsequent characterizing something that took place at or before that time that will be our contention.

The Court: I wanted to know whether you contend it is immaterial as to what was done as to the development under this lease after the suit was brought.

Mr. Thompson: We have thought it would be limited to the time the suit was filed. Inasmuch as they have gone into this we will be glad to receive the evidence.

The Court: I wanted to know whether to exclude the evidence. You can't blow hot and cold.

Mr. Currey: I would rather take the theory that they could introduce all the evidence, but we will introduce testimony of events that took place after this for the purpose of characterizing.

The Court: You can't go and exclude their development after this happened and then get in your development afterwards.

Mr. Currey: No, it is not on the question of development.

Mr. Thompson: Question of good faith.

The Court: Well if you have a right to show development to show good faith they have a right to show their development to show good faith. So I wanted to know when you are making this motion what your contention is.

Mr. Currey: We will withdraw the motion.

The Court: Very well.

Mr. Ewert: Of course our contention all along has been that that is not material but was brought in on cross examination.

V. SWINEHEART, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Ewert.

Q. State your name and residence. A. V. Swineheart.

Q. Where do you live? A. St. Louis, Oklahoma.

Q. Are you familiar with this forty-acre tract of the Fish land concerning which Mr. Wilson just testified.

A. Yes, sir.

Q. Are you the Mr. Swineheart named by him in his testimony? A. Yes, sir.

Q. I think this may be greatly shortened if I might ask the question: Did you hear the testimony of Mr. Wilson?

A. Yes, sir.

Q. If permitted would you testify to the same facts?

Mr. Currey: We object.

The Court: Examine him in the proper way, they object.

Q. Did you work there on that forty in the month of October, 1917? A. Yes, sir.

Q. Tell the court just what you did and under whose direction and what happened.

A. Went to work along about the first of October, 1917, under the direction of W. P. McCullough.

Q. The plaintiff in this suit?

A. Yes, sir, sinking a shaft.

Q. What did you do?

A. We sunk a shaft about eight or nine feet, cribbed it up and we was ordered to get off before that by Mr. Plumb and Mr. Wilkins.

Mr. Currey: We object to the statement as being a mere conclusion as to what was done.

Q. Was that order in writing? A. Yes, sir.

Q. I show you an instrument marked Plaintiff's Exhibit #9 and ask you if that was served on you, if so by whom?

A. Yes, sir.

Q. Are you the Swineheart named in the notice?

A. Yes, sir.

Q. Who was present when the notice was served?
A. Perry the constable, Wilkins and Mr. Plumb.
Q. Go on and tell the court what happened.
A. That happened about eleven o'clock and about one o'clock Mr. Perry came down with some warrants and we was arrested and gave bond for myself and Mr. Williams; Mr. Short went on to jail.
Q. Where did they take him? A. Miami.
Q. What happened then?

Mr. Thompson: I think that is immaterial, your honor please, that these gentlemen were arrested.

The Court: Why, yes, it is immaterial.

Q. All right at the justice of the peace's office in Century or Douthat what did you do?
A. Did nothing more, that is on the shaft.

The Court: Did you go back there?

A. No, sir, not until after we appeared at the trial.
Q. Did you go down near the shaft after that?
A. Went down the road two or three hundred yards from the shaft.
Q. What did you see?
A. Well, the shaft was smoking and our tent and cooking outfit was in the road.
Q. Was anybody up in the road?
A. No, sir, I didn't get back until after dark.

The Court: Where was your tent?

A. The tent was right at the shaft, probably fifteen or twenty feet from the shaft and it had been thrown out in the road.
Q. When you say the road tell the court whether it was on or off the land. A. I judge it was off.
Q. Was the road on the north line? A. Yes, sir.
Q. What did you observe that night?
A. Well there was teams going down there and I suppose they was going down for the purpose of dragging off our stuff.
Q. Who was driving the teams, could you tell who they were? A. No, sir.

Mr. Thompson: Your honor we move to strike from the record what he supposes.

The Court: Yes.

Q. What did you see?
A. Nothing but the teams and men driving them.
Q. What did you do? A. Going down towards the mine.
Q. Well then what did you see? A. Nothing more at all.

Q. Were they doing anything around the shaft at night?
A. They were drilling there.

Mr. Thompson: We object to the question, it doesn't refer to anybody except "they".

Q. Did you identify any of the men that were down there as you looked over there that night?
A. No, sir, this was after night.

The Court: What was done there that night?

A. The machinery was pulled off the ground that night.

The Court: What do you mean by machinery?

A. Boiler and hoister and blower and some timbers I believe.

Q. What was that machinery used for?
A. Was to be used to sink the shaft; it wasn't erected at that time.

Mr. Ewert: Take the witness.

Cross Examination by Mr. Thompson.

Q. This all occurred when, Mr. Swineheart?
A. In October, 1917.
Q. And you were not using this machinery were you?
A. No, sir, it had just been brought there.
Q. It isn't customary to use a hoister and blower to sink six or eight feet is it? A. No, sir.

Mr. Thompson: That is all.

The Court: Do you know what it was to be used for?

A. Yes, sir.

The Court: What were you going to use it for?

A. Erect the house and for the sinking of this shaft.

The Court: Stand aside.

(Witness dismissed.)

JESSE SHORT, produced, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Ewert.

Q. State your full name and residence. A. J. M. Short.
Q. What is your business? A. Mine operator.
Q. How long have you been in the Joplin District?
A. Fifty-five years.
Q. Are you familiar with this forty-acre tract of the Fish land just *west* of the Montreal? A. Yes, sir.

Q. Tell the court whether or not you did any work on that in the summer or fall of 1917.

A. I was sinking a shaft and attempting to sink it under Mr. McCullough's instruction.

Q. And did you have an interest in the lease?

A. Yes, I bought an interest.

Q. Tell the court what you know about that, I haven't talked with you; were you present when any of these instances occurred? A. No, sir.

Q. You may tell the court whether or not at that time you furnished the equipment for sinking this shaft. A. I did.

Q. What did you furnish and have on the ground at the time you refer to?

A. Well all necessary timbers in building a derrick, boiler, hoister and blowers and supplies necessary to put the shaft down.

Q. Tell the court if at that time you had the means and money to sink the shaft and erect the mill.

Mr. Thompson: Object to the question as being leading and suggestive.

The Court: Well what was your ability to do that work, just explain.

A. Well I had the money to sink the shaft and I had a mill to put on the ground to complete the work.

The Court: Who did you make the contract with to do that?

A. I had a contract with Swineheart and Wilson to sink the shaft.

The Court: Go ahead.

Q. I think you may have misunderstood that. Who did you have the contract with? A. Oh, Mr. McCullough.

Mr. Ewert: Take the witness.

Cross Examination by Mr. Thompson.

Q. You had a sublease from Mr. McCullough?

A. No, sir, I bought a half interest in the lease.

Q. That is in the original lease?

A. Well, I don't know, I didn't question that or look into that.

Q. Well was it in writing?

A. The contract will show.

Q. It was in writing was it? A. Yes, sir.

Q. And you had a half interest with McCullough?

A. Yes, sir.

Q. On that forty? A. On that forty.

Q. And how long before had you acquired that?
A. Oh some time I think about October 21st.

The Court: What year, 1917?

A. 1917.
Q. You have mined about thirty years? A. Yes, sir.
Q. Mined any in the Miami Field?
A. Well quite extensively.
Q. Do you sink shafts in the Miami Field without drilling?
A. No, sir.
Q. Now this was your shaft was it, your work?
A. Yes, sir.
Q. You say you were working for McCullough?
A. Yes, sir, under a sublease.
Q. Then why were you working under his sublease if you had a contract? A. The contract will show for itself.
Q. Well I assume it will but why were you employed by McCullough if you had an interest and a contract to sink?
A. Well I accepted that provision of that contract on the condition of the outcome of this litigation, I understand there was litigation.
Q. You knew other people were in possession didn't you?
A. No, sir.
Q. You did when you went on there?
A. We found it out shortly afterwards.
Q. What did you find there?
A. Well they was drilling there at that time.
Q. Who was drilling?
A. I don't know; I understood it was Plumb and Wilkins.
Q. How many drills? A. Two.
Q. Do you know how many holes they drilled on that?
A. No, sir.
Q. Drilled about eighteen holes?
A. I don't know; there was holes drilled there.
Q. Do you know anything about what they were striking?
A. Supposed to be secret but I secured some cuttings and it seemed to be very rich.
Q. And that is why you started your shaft without any drilling? A. I was informed.
Q. They struck rich ore about October, 1917, and you found it out? A. I knew it was valuable property.
Q. Well you found that out by reason of this information as to the strike Plumb and Wilkins were making?
A. Not only from that. I had drilled on the Montreal before and I knew it was valuable property.
Q. That is on the forty east?
A. It was only two or three hundred feet east.
Q. How far did you start your shaft from any drill hole?

A. About twenty-five feet.
Q. Away from the Wilkins and Plumb drill?
A. I presume they put the holes in there I don't know.
Q. And you don't know what was in there except what you heard? A. They told me it was a blank.
Q. But you had information and you saw the cuttings that there was a rich strike? A. Yes, sir.
Q. And you sank without any prospecting whatever?
A. I was aware of the fact that it was there.
Q. Well what made you think the ore was there?
A. I seen the cuttings.
Q. Upon this forty? A. On this forty in question.
Q. Are you still interested in the property? A. Yes, sir.
Q. Can you tell the court what your interest is?
A. Will be half.
Q. Half interest with McCullough?

The Court: He testified he acquired it after the suit was filed and was contingent on the outcome of the suit.

Q. Half interest in the original lease?
A. Not the original lease.
Q. In his sublease? A. Yes, sir.

Mr. Thompson: I believe that is all.

Redirect Examination by Mr. Ewert.

Q. Prior to the time you went on there had you knowledge of what is known as the Scott drilling that was done the year before? A. Yes, sir.
Q. Had you knowledge of the fact that ore was found in the Scott drilling? A. Yes, sir.
Q. How far did you sink the shaft from the Scott drilling?
A. Possibly 150 feet to the best of my knowledge.
Q. To refresh your recollection, if you know tell the court whether or not this sublease that you took over was the sublease which originally McCullough and others had made to Mr. Scott?
A. I understood by Mr. McCullough that it was a sublease made to Scott.
Q. And you were taking that over with him? A. Yes, sir.

Recross Examination by Mr. Thompson.

Q. Now you mean their contract was assigned to you, Mr. Short?
A. No, sir, they have the contract here in court that will show that transaction.
Q. You say you did have information as to what Adam Scott struck in his three holes? A. Yes, sir, I had heard.

Q. What did you hear? A. That he struck good ore.

Q. Did you hear him testify from his books, his logs in which he said he didn't find anything but shines?

A. I heard his testimony.

Q. Do you know whether that is true or not?

A. I don't know, I never saw any of the cuttings.

Mr. Thompson: That is all.

(Witness dismissed.)

Mr. Ewert: That concludes that portion of the testimony except we want to introduce documentary evidence. We thought we had the assignment showing the interest held by Beth and Phillips and at the reconvening we want to offer that and I think there will be some witnesses to prove the payments of money by Hopper and McCullough. Then at this time in order to make a record—we can't quite agree with the court on excluding the Hopper testimony—and to make a record plaintiff now offers to prove by Dallas Hopper, the original lessee, whose sole interest now—who parted with all his interest to McCullough in this lease and whom the evidence now shows was only a sublessee from McCullough and others, the physical fact of the payment by Hopper to Fish of the moneys, lieu moneys to the amount of $20.00 and some odd cents, the offer being only as to the physical fact of the payment without offering to show any word said by Fish or any conversation between Fish and Hopper.

Mr. Thompson: The defendants object to the offer on the ground it is now shown by the testimony that Leander J. Fish is dead and that the adverse party in this suit is the assignee of the lessee and that the same Dallas Hopper is assignor of the plaintiff in this case.

The Court: The objection will be sustained.

Mr. Ewert: Kindly allow us an exception.

The Court: The plaintiff will be allowed an exception.

And thereupon further hearing in this cause was continued.

And thereafter and on July 1, 1919, the hearing was resumed in the above entitled cause, the plaintiff appearing in person and by his counsel Paul A. Ewert, Esq., and James L. Davenport, Esq., and the defendant appearing in person and by his counsel Hiram W. Currey, Esq., and A. Scott Thompson, Esq., and the following proceedings were had to-wit:

Mr. Ewert: Plaintiff now offers in evidence Plaintiff's Exhibit No. 10, which is an assignment of a part interest in the original Dallas Hopper lease from Dallas Hopper to Thomas F. Phillips, one of the plaintiffs in this suit; and in like manner an assignment, Plaintiffs' Exhibit No. 11, which is an assignment of an eighth interest in the original Hopper lease from Hopper to B. E. Beth, the remaining plaintiff in this suit, which are certified copies of the original assignments as recorded.

HENRY PAYNE HOPPER, produced, sworn and examined as a witness for and on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Ewert.

Q. State your name, please. A. Henry Payne Hopper.
Q. Where do you reside? A. At Douthat, Oklahoma.
Q. How long have you resided there?
A. About three years.
Q. Continuously?
A. Well about all the time yes, sir.
Q. Before that where did you reside?
A. Miami, Oklahoma.
Q. Are you related to Dallas Hopper?
A. He is my father.
Q. He is your father? A. Yes, sir.
Q. You were not in the State of Oklahoma or in the country three months ago were you?
A. No, sir, I just came back from France, got in the 23rd of last month.
Q. You were not here at the time of the trial? A. No, sir.
Q. Were you acquainted with Leander J. Fish during his life time? A. Yes, sir.
Q. Where were you residing during the year 1914?
A. Miami, Oklahoma.
Q. Who with? A. My father.
Q. Did you during the year 1914 see Leander J. Fish at your father's house? A. 1914?
Q. Yes. A. Yes, sir, I did.
Q. To fix the time did you see him a number of times, more than once there?
A. Yes, sir, I seen him there quite frequently.
Q. Did you hear any conversation between him and your father in the year 1914? A. Yes, sir, I have.
Q. Did you hear any conversations in the fall of 1914?
A. Yes, sir.

Q. About what months?

A. Well it was along about the last of September or first of October to the best of my knowledge.

Q. What was that conversation about?

A. Why Mr. Jack Fish he came to our house and wanted some money, wanted ten dollars from my father on a mining lease, rental money on a mine lease if I understand it right, and my father told him that he already had him paid up.

Mr. Thompon: Now if the court please, we object to any statements as to what this young man's father said there, purely hearsay, on the ground it is hearsay.

Mr. Ewert: We wish to prove the conversation at that time between Leander J. Fish and Mr. Hopper.

The Court: On what theory?

Mr. Ewert: We are proving that he paid this penalty money.

The Court: Yes, that is proper.

Mr. Thompson: Of course we are objecting, your honor please, not to what Jack Fish but what a third party said.

The Court: I will see what he said.

Q. What was said there in respect to the payment of that money?

A. He wanted to get ten dollars, he said he had to get some clothes I believe.

The Court: Who wanted ten dollars?

A. Jack Fish.

The Court: Who is Jack Fish?

Mr. Ewert: Leander J., they called him Jack.

The Court: You mean by Jack Fish, Leander J. Fish?

A. Yes, sir.

The Court: All right, go ahead.

A. And wanted ten dollars to get some clothes and wanted to apply it as his rent money on his mining lease; and my father told him he already had him paid up in advance until 1916 some time, but he let him have ten dollars.

The Court: How much?

A. Ten dollars, and he told Jack Fish that he wasn't going to let him have any more money until he was due money.

Q. Now during that year 1914 you stated that you saw him a number of times at your father's house——

Mr. Thompson: Pardon me, Mr. Ewert.

Mr. Ewert: Yes.

Mr. Thompson: Now, if the court please, I move to strike from the record all the testimony of what was said by Hopper to Jack Fish.

The Court: I think that is proper, I will overrule the objection.

Mr. Thompson: Exception.

The Court: You can raise that. I will hear you on that later just like the other objections in the brief. Of course I want to have that before my mind with this other evidence when I finally pass on it.

Q. Do you know what Mr. Fish came for from the conversation?

A. He usually got a horse to drive out to the place, a horse and buggy, we had it there.

Mr. Thompson: We move to strike it out.

The Court: Yes.

Q. State what he asked of your father and what your father told him and what the circumstance was.

A. Well as I repeated he wanted ten dollars for some clothes.

Q. No, I mean about the horse.

A. He wanted to get our horse and buggy to drive out to his place and my father always let him have it times before that and after that.

The Court: How many times in 1914 did he get your father's horse and buggy to drive out to his place?

A. I believe I would be *save* in saying three or four times.

Mr. Ewert: That is all.

Cross Examination by Mr. Thompson.

Q. Mr. Hopper when was the first time that your father let Fish have the horse to drive, what was the date?

A. Well it was along in the summer of 1914.

Q. What month?

A. I judge along about—I couldn't say, along in the summer time.

Q. When was the next time?

A. Well it appears to me it was in October or November along about the last.

Q. That was the second time? A. Well yes.

Q. When was the next time? A. I can't say exactly.

Q. Those are the only two times you remember?

A. Three or four times, I don't exactly remember the date.

Q. When was this conversation you have just detailed in regard to the money?

A. That was along about the last of September or first of October.

Q. How can you fix that time, Mr. Hopper?

A. Well I would say it was the last of September or first of October.

Q. Were you at home at that time? A. Yes, sir.

Q. Where were you working at that time?

A. I was working out home, I don't know whether I was working any place right at the present time or not.

Q. Where were you working during the year 1914?

A. I worked out in the mines a great deal.

Q. What mines? A. Out from Commerce.

Q. What mine? A. Turkey Fat.

Q. In 1914? A. Yes, sir.

Q. With reference to the time you heard this conversation when did you work at the Turkey Fat?

A. I can't just recollect about that.

Q. How can you so definitely fix this time?

A. How is that?

Q. How can you fix this time as being September?

A. Well I can fix it the last of September or first of October to the best of my knowledge.

Q. You can't remember what you were doing at that time for a livelihood?

A. No, only I was just around the house there.

Q. Now what was it that Jack said?

A. Well he wanted to get ten dollars.

Q. What did he say?

A. Well he wanted my father to let him have ten dollars to buy some clothes with and let it apply on his rent money on the mining lease

Q. Can you tell the court what words he used?

A. Well he said that he wanted to get ten dollars to buy some clothes with.

Q. Is that the first he said when he came in?

A. Well, no, sir.

Q. What did he say when he first came in?

A. Well he spoke and had a friendly chat and finally stated his business.

Q. What did he say about his business, what was it?

A. His business?

Q. Yes.

A He wanted to get ten dollars to buy some clothes with and let it apply to his rent money on a mining lease, and my father told him——

Q. I am asking what Jack Fish said.
A. That is what he said.
Q. Is that the only statement made by Jack Fish at that time in your presence?
A. Well, I believe it was about all yes.
Q. And he got the money and went out?
A. Yes, sir, he got the money.

(Witness dismissed.)

Mr. Ewert: The plaintiff rests.

The Court: Has the defendant anything else to offer?

Mr. Thompson: We haven't offered anything yet, if the court please. We didn't offer any evidence in this case up to date.

Mr. Ewert: Now, may it please the court, we have a witness that is anxious to get back and it is probably anticipating the defense a little but we know what the defense was in the application for injunction, and by consent of counsel and if agreeable to the court we would like to put him on.

The Court: Very well.

O. B. BALLARD, produced, sworn and examined as a witness for and on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Ewert.

Q. State your full name, Mr. Ballard. A. O. B. Ballard.
Q. Where do you reside? A. Eureka, California.
Q. Where did you reside in the year 1912?
A. Miami, Oklahoma.
Q. Were you personally acquainted with Leander J. Fish in his lifetime? A. Yes, sir.
Q. Were you and are you acquainted with Dallas Hopper?
A. I am.
Q. I show you Plaintiffs' Exhibit No. 1, which is the mining lease under which plaintiff claims, and direct your attention to the acknowledgment of it and ask if that is your signature? A. Yes. sir.
Q. That lease is dated the 29th of April, 1912.

The Court: What is the number of the exhibit?

Mr. Ewert: Plaintiffs' Exhibit No. 1, being the mining lease under which plaintiffs claim.

Q Tell the court the circumstances under which that was executed and all the facts in connection with it.

Q. Well what do you mean?

Mr. Ewert: Well I will put it in a different form. Withdraw that question.

Q. Did you acknowledge this lease? A. Yes, sir.

Q. Plaintiffs' Exhibit No. 1? A. Yes, sir.

Q. Who was present if any one at the time the instrument was acknowledged? A. Mr. Hopper, Mr. Fish——

Q. Leander J. Fish?

A. Yes, Mr. Willum and I think Mr. Duffy.

Q. At the time this lease was executed and acknowledged as you have stated what was done with the lease after you had acknowedged it?

The Court: Did he sign the lease?

Mr. Ewert: He was the notary public.

Q. You were the notary public at that time?

A. Yes, sir.

Q. And you took the acknowledgment of Dallas Hopper and Leander J. Fish? A. Yes, sir.

Q. And there was present J. C. Willum in addition. Do you know what was done with the lease?

The Court: They appeared before you both Leander J. Fish and Hopper?

A. Yes, sir.

The Court: And acknowledged they signed it and for the purposes?

A. It was signed.

The Court: You saw them sign it?

A. Yes, sir.

The Court: But you saw then that they acknowledged it for the purposes therein stated?

A. Yes, sir.

Q. What became of the mining lease after you took the acknowledgment and after it was executed as you have indicated?

A. I turned it over to Mr. Hopper.

Q. In Mr. Fish's presence?

A. Yes, sir, they both went out of the place together.

Q. Now at that time let me ask you the direct question, was the lease placed in escrow with you? A. No, sir.

Mr. Currey: I object.

The Court: He says it was not.

Q. Was there anything said there in your presence or in

your hearing as to any conditions attached to the delivery of this mining lease?

Mr. Currey: Wait a minute I object. I think that the witness should be simply asked to tell what was said there without leading him.

The Court: Well he was an officer.

Mr. Ewert: And it is anticipating their defense.

The Witness: What was the question?

(Question read by the reporter.)

A. Not that I remember of.

The Court: Was there anything said around there in substance or effect that that was a lease made on condition or anything like that?

A. No, sir.

Mr. Ewert: You may take the witness.

Cross Examination by Mr. Currey.

Q. What was Mr. J. C. Willum and Mr. Duffey doing there?

A. Well, sir, I don't know that they were doing anything. They both frequented the place frequently.

Q. What was Duffy's first name?

A. Well, sir, I can't tell you. It has been five or six years and I have forgotten his name.

Q. Mr. Duffy isn't here? A. I haven't seen him.

Q. Nor Mr. Willum? A. Mr. Willum is here.

Q. You don't know what Mr. Willum was there for?

A. He came in there most every day.

Q. Did he come there with Dallas Hopper and Leander J. Fish?

A. I don't think he did; I think he was sitting there.

Q. How large an office did you have?

A. Oh, I am guessing at this, it was a wooden building that had been used for an ice cream parlor and was cut up into three rooms and one of them was ten by twenty and the other two were cut off of the back.

Q. Was your office in any side room?

A. It was in all of these.

Q. Which room were you in? A. Front one.

Q. That was the one ten by twenty, about? A. Yes, sir.

Q. And was Mr. Willum in that same room with you?

A. Yes, sir.

Q. And Mr. Duffy also?

A. Yes, sir, that was a public office. Whenever anybody came in there they was in that room.

Q. Do you know Joe Fish?

A. That is the young man I suppose.

Q. Yes. A. I knew him as a boy.

Q. He was with his father? A. I don't think he was.

Q. Was J. C. Willum in the office or did he come in with Fish and Hopper?

A. I think he was there but I wouldn't say positive about that, but my opinion is he was there when they came in.

Q. That is your best recollection? A. Yes, sir.

Q. That he was there when they came in? A. Yes, sir.

Q. Do you recall any conversation you had with Mr. Willum about that time? A. No, sir, I do not.

Q. You say Duffy was also there? A. Yes, sir.

Q. Were you engaged in conversation with Mr. Duffy and Willum when they came in?

A. I couldn't say that, possibly was.

Q. Do you recall what was the first thing said to you by either Hopper or Fish when they came into the room?

A. I don't know the first thing. Mr. Hopper came in there and said he wanted to make a lease with Mr. Fish and have me acknowledge it.

Q. Did Fish say anything?

A. I don't know that he did; I don't recollect that.

Q. Did Hopper and Mr. Fish depart together?

A. Yes, sir.

Q. Did they go out immediately after the acknowledgment of the lease? A Yes, sir.

Q. Which one carried the lease away? A. Mr. Hopper.

Q. They were in your office all told five or ten minutes?

A. Possibly that much, maybe fifteen or twenty.

Q. As soon as you handed the lease over they departed together? A. Yes, sir.

Q. Was there any conversation between Mr. Hopper and Fish there in your presence about the lease?

A. I don't think there was.

Q. Did you hear any conversation about a team?

A. Not that day.

Q. Did you hear any conversation or any talk about a team Mr. Duffy or Willum figured in this conversation?

A. No, sir.

Q. What day was it you heard the conversation about the horses or team?

A. That was some little time later, I wouldn't say maybe three or four days and maybe ten or twelve.

Q. Where did that conversation take place?

A. I heard that on the street, it wasn't from either Hopper or Fish.

Q. Was it somebody who proposed to understand and know what the transaction had been between these parties?
A. I don't know that, I don't know who I heard it from.
Q. Do you know Mr. Bert Fowler? A. Who?
Q. Bert Fowler, do you know Bert Fowler? A. No, sir.
Q. And do you know Mr. Rawlings? A. Mr. Rawlings?
Q. Forrest Rawlings, do you know Forrest Rawlings?
A. I might if I saw him; I don't remember him though.
Q. Do you recall who it was the persons you heard talking about the lease? A. No, sir, I do not.

The Court: That is hearsay. You needn't answer that.

Mr. Currey: That would be hearsay, your honor. I am not going to ask what any of the parties said.

The Court: I don't see how that is material. That is not competent evidence in the case.

Mr. Currey: Well I think it might be competent if some other witness comes on the stand who did have the conversation.

The Court: You couldn't bolster up their evidence like that.

Mr. Currey: Well we except.

The Court: Not competent in view of the record now.

Mr. Currey: Well I don't know whether that is covered in the objection or not or in the court's ruling or not. I was trying if I could to locate the persons that he talked with that is all.

The Court: I know but it would be immaterial. He says he don't know anything about it of his own knowledge. I am not going to permit fishing expeditions in this court, we haven't got time for that.

Mr. Currey: That is all.

Mr. Ewert: That is all.

(Witness dismissed.)

Mr. Ewert: May Mr. Ballard be excused?

The Court: If the other side consents to it.

Mr. Currey: Yes.

The Court: Very well.

And thereupon the plaintiffs having offered their evidence in chief and rested the defendants offered the following evidence:

DEFENDANTS' EVIDENCE.

Mr. Thompson: The defendants offer in evidence certified copy of a lease made by Leander J. Fish to Wesley M. Smith November 4, 1912.

The Court: How long was this after the other lease was made?

Mr. Thompson: About six months. Your honor, these exhibits are all in the other case. Being Defendants' Exhibit No. 17 in the case of *Unkle* v. *Fish et al.*, and ask to have same marked for identification Defendants' Exhibit No. 2. We also offer in evidence Defendants' Exhibit No. 3, being Defendants' Exhibit No. 18 in the case referred to.

Mr. Ewert: Now just a moment, your honor. Those have already been excluded upon their objection.

Mr. Thompson: Oh, no, they haven't been excluded.

Mr. Ewert: We offered them and they objected to them and they have been excluded.

The Court: Very well, you are not very much in an attitude to object to them.

Mr. Thompson: Are you objecting to introducing them in this case?

Mr. Ewert: No, not as to Exhibit No. 3.

The Court: Of course he has a right to file his objections later under the agreement.

Mr. Thompson: We would like to have this understanding, if the court please, these are certified copies.

The Court: He can object to them later on the ground of their incompetency, immateriality or irrelevancy. If it is on account of whether or not they are not properly certified he waives that unless he raises it now.

Mr. Thompson: Of course it is our title.

The Court: Yes.

Mr. Ewert: They seem to be certified copies.

Mr. Thompson: We now offer in evidence Defendants' Exhibit No. 4.

Mr. Ewert: No objection.

Mr. Thompson: Defendants offer in evidence Defendants' Exhibit No. 5.

Mr. Ewert: No objection.

C. F. DIKE, produced, sworn and examined as a witness for and on behalf of the defendants, testified as follows:

Direct Examination by Mr. Thompson.

Q. State your name. A. C. F. Dike.
Q. How old are you? A. Forty-two.
Q. Where do you reside? A. Joplin, Missouri.
Q. What is your business? A. Mining engineer.
Q. Are you an operator? A. Yes.
Q. Are you interested in mining, Mr. Dike, upon what is known as the Fish land? A. Yes, sir.
Q. And can you without reference to any records give the description of the land that you are operating upon?
A. It is the northwest of the northeast of section 32 I believe it is.
Q. That is township 29, 23? A. 29-23 east.
Q. And you are operating what is known as the Montreal Mine? A. Yes.

Mr. Thompson: I will state to your honor that this is a little out of order but Mr. Dike wanted to get away on that four o'clock train.

Q. Mr. Dike, you are operating under the Church-Mabon title? A. Yes, sir.
Q. Under the Smith lease? A. Yes.
Q. When did you commence your prospecting and development work on that ground? A. In December, 1915.
Q. Are you sure about that? A. Yes.
Q. Did you do any drilling?
A. We drilled one hole I believe before the first of 1916 and started a shaft sinking.
Q. Has there been a mine developed on that property?
A. Yes, sir.
Q. I wish you would state to the court if you can, referring to any memoranda if you have it, the amount of moneys expended by you upon this property prior to July 1, 1916.

Mr. Ewert: May it please the court that is objected to as incompetent, irrelevant and immaterial.

The Court: You have your objection under the rule.

A. I have a copy from the books of account.
Q. Just read to the reporter the totals prior to July 1, 1916. A. The total expenditure is $25,836.25.
Q. What has been your total investment or expenditures there up to the present time at the time that information was secured?

Mr. Ewert: Same objection.

A. Up to June first from the beginning $807,477.38.

Q. And this has all been on the forty-acre tract you speak of? A. Yes.

Q. You have no interest in the remaining 160 acres?

A. Well there are a few hundred dollars of that spent on that forty immediately west.

Q. That was for drilling? A. Yes.

Q. Would you estimate about how much of that?

A. Oh possibly two thousand dollars.

Q. About July 1, 1916, what was the condition of the property known as the Montreal forty with reference to mining and improvement?

A. Well we had sunk the shaft into the ore, the first shaft into the ore body and just started drifting prior to that time in this hole. At that time we had a small hand-jig running.

Q. Was December 1, 1915, the first time you became interested in the property?

A. Well I had an option prior to that time, I think that was early in November, yes must have been earlier than the middle of November.

Q. That is you had an option upon this particular property? A. Yes, sir.

Q. And that is the option you did close and become interested in? A. Yes, sir.

Q. Are you an officer or employee of the Montreal Mining Company? A. Yes, sir.

Q. What are your duties there? A. Manager.

Q. You are on the ground, their active manager?

A. Yes, sir.

Q. This forty known as the Montreal forty is a part of and immediately adjacent to the rest of the allotment of Leander J. Fish? A. Yes.

Q. Do you know anything about prospecting this land prior to the time you acquired an interest?

A. Only so far as some drill holes that were down on our particular forty.

Q. Well were you there so you saw it yourself?

A. No, I didn't see the drilling; I simply saw the original records of the holes.

Q. And this mining you have disclosed was all done under the Smith lease? A. Yes, sir.

Mr. Thompson: Take the witness.

Cross Examination by Mr. Ewert.

Q. Mr. Dike you have been asked to detail the amount of the expenditure on that property and you have stated that those expenditures were how much?

A. Something over eight hundred thousand dollars.

Q. Now just leaving the statement that way it would be unfair to the court. How much of that expenditure was for the mining of ore, you don't mean to tell this court you spent $800,000 in prospecting and drilling?

A. The total expenditure.

Q. Yes, but that includes all you have spent in mining ore?

A. That includes investment in the mine and all.

The Court: How much ore have you taken out?

A. About a million seven hundred thousand dollars worth.

The Court: Now this expenditure includes improvements made in mining and expenditures for expenses and wages and everything.

A. Exactly, that is the total expenditure.

The Court: And the total income was a million how much?

A. Seven hundred thousand.

The Court: A million seven hundred thousand dollars.

A. Approximately. That is not deducting the royalty.

Q. Did I understand you to say up to the first of July, 1916, you had expended $25,000 in round numbers?

A. Yes, sir.

Q. Now could you give the court an off-hand statement of the expenditures, the expenditures I mean in the form of a mill from the expenditures of mining the ground? A. Yes.

Q. Let's get it all before the court.

A. The total investment exclusive of any expenses for mining up to July 1, 1916, is $20,731.55.

Q. What makes up the difference between twenty and twenty-five? A. Operating.

Q. So your total expenditure was $20,000 up to the first of July, 1916? A. Yes.

The Court: Why do you fix that date?

Mr. Ewert: That is the date the suit was filed. Evidently it is incompetent evidence but they brought it out after that fashion to show what they had expended after we brought this lawsuit.

The Court: He says all improvements is $20,000.

Q. And $5,000 was operating expense? A. Yes, sir.

Q. And at that time you had on the surface from twenty to $30,000 worth of ore? A. We hadn't sold any.

Q. It was on top?

A. We probably had between three and four hundred ton on the ground at that time.

Q. All right returning to the amount of expenditures how much did this mill cost, give those figures?

A. Total figures?

Q. Well just give us first what your mill cost?

A. Well our total investment is $243,982.82.

Q. And of what items is that total made up?

A. Development and betterments in every way, plant, equipment, drilling.

Q. Any mining? A. No mining.

Q. Then the difference between two hundred some odd thousand you have named and eight hundred thousand represents the cost of your operation? A. Operation cost.

The Court: How much royalty?

A. $433.542.60.

Q. Twenty-five per cent is the royalty shown in the evidence? A. Yes, sir.

Q. Now out of that $20,000 that you have stated does that include the $5,000 bonus that you paid? A. Yes, sir.

Q. Then as a matter of fact you had only expended 15,000? A. No, we paid the 20,000.

Q. But I mean in betterments, you paid 25% royalty and $5,000?

A. This $5,000 was to cover drilling on the property up to the time we took it over.

Q. This $5,000 in the form of bonus was in addition to the 25%? A. Yes.

Q. Leaving 15,000 actual expenditure on the first day of July, 1916, and that was all expended on what is known as the Montreal except some drilling on the Quebec forty?

A. Yes, sir.

Mr. Ewert: That is all.

(Witness dismissed.)

Mr. Thompson: I think Mr. Dike wants to be excused.

Mr. Ewert: No objection.

The Court: Very well.

W. A. WAGONER, produced, sworn and examined as a witness for and on behalf of the defendants, testified as follows:

Direct Examination by Mr. Currey.

Q. State your name. A. W. A. Wagoner.

Q. Where do you reside Mr. Wagoner?

A. Miami, Oklahoma.

Q. How long have you lived in Miami? A. Since 1898.

Q. What is your business?

A. I was in the mercantile business until two years ago I sold out.

Q. Were you acquainted in the lifetime of Leander J. Fish with Mr. Fish? A. Yes, sir.

Q. Do you know Joe Fish? A. Yes, sir.

Q. Do you know Dallas Hopper? A. Yes, sir.

Q. Do you remember the occasion of a lease contract between Dallas Hopper and Leander J. Fish along about the 29th of April, 1912? A. Yes, sir.

Q. During that time did you have any conversation with Mr. Hopper, Mr. Wagoner if you will just tell what you know in regard to that transaction.

The Court: Did you lay the predicate for this?

Mr. Davenport: Not in the examination of Mr. Hopper they did not; at least I don't find anything in the transcript. Mr. Hopper was on the witness stand.

Mr. Currey: This is not impeaching testimony.

The Court: Well now they used Hopper as a witness and he testified. Now unless this man was present when the contract was made it wouldn't be substantive evidence.

Mr. Currey: It is a matter of defense. I would have put one witness on before him except that I wanted to let him get away.

Mr. Ewert: We object to it, incompetent, irrelevant and immaterial, no foundation laid.

The Court: Unless this is evidence as to what the contract was Hopper claims he made to Fish this would merely be impeaching evidence to show contradictory statements.

Mr. Currey: If the court please the answer pleads that there was an agreement between Fish and Hopper by which Hopper was to give Fish a team and wagon.

The Court: That is true but you can't prove that by what Hopper said afterwards.

Mr. Currey: I am asking him about something that took place prior to the execution of the lease in regard to the lease, in regard to the team.

The Court: Well I will let him testify.

Mr. Ewert: It is objected to particularly because no time is established, whether before or afterwards.

The Court: Of course this is objected to on the ground it is not substantive evidence, no predicate laid, and I will rule on it later.

Q. Mr. Wagoner I have fixed the time some time along about the 29th of April, 1912.

A. Well this deal happened in the spring of 1912 before crop making time. The way it commenced——

Mr. Ewert: We would rather he would ask the questions and give us a chance to object.

Mr. Currey: I am asking him to tell what he knows about that transaction.

The Court: That is too indefinite. Were you present any time when they made a contract.

A. I was there a time or two when they were talking about a contract.

The Court: Were you ever present when they agreed on a contract?

A. Well I guess I was, yes, sir.

Mr. Currey: I don't understand the court. Mr. Hopper is a plaintiff.

The Court: I didn't know Hopper was a plaintiff. He can state any statements. My understanding was they held an assignment.

Mr. Currey: This all took place before they were an assignee of Hopper.

The Court: If that is true—you make the statement that Hopper is a plaintiff here, is that true?

Mr. Currey: Not on the record?

The Court: That is not a correct statement.

Mr. Currey: That they——

The Court: No, I have ruled. We will not discuss it any further. Go ahead.

A. Well shall I tell it in my own way?

Mr. Ewert: Let's ask the question and give us a chance on it. We object to the question as being too general.

Q. Mr. Wagoner if you had any conversation with Hopper about this time state what that conversation was.

Mr. Ewert: That is objected to upon the ground there is no foundation laid.

The Court: Yes, that is sustained. That objection is sustained.

Mr. Currey: Well will you permit me to suggest to the court this proposition: that the conversation had and the things done by an assignor while he is claiming the interest, while he has whatever the other party has received, that which takes place before his assignment is binding upon his assignee? That surely is the law.

The Court: Well now when the assignor testifies in the case you will have to show me some authorities before I will believe that is the law. The way I understand the law is that you testify as to the substantive evidence; then if the man gets on the witness stand and denies that you lay the predicate. You had a chance to lay a predicate. Now go ahead and ask the question.

Q. Did you hear a conversation between Mr. Fish and Mr. Hopper along about April 29, 1912, in regard to the taking of the lease in this case? A. Yes, sir.

Q. Now state what that conversation was.

Mr. Ewert: That is objected to for the same reason, that no foundation has been laid, no foundation or predicate.

The Court: Was this before this lease? What is the date of this conversation?

A. Well the lease was right along the last of April.

The Court: Do you know when the lease was dated?

A. Yes, sir, about the 29th. I know the day it was made but I didn't see it made.

The Court: Now how long before this was it?

A. This was the day before or probably two days that this conversation happened with me.

The Court: Very well.

Mr. Ewert: Same objection.

The Court: What does the lease recite the consideration?

Mr. Currey: I expect the lease recites one dollar and the covenants in the lease.

The Court: You can't contradict the lease by parole evidence.

Mr. Currey: Not for the purpose of destroying its operative effect, but we can for the purpose of showing a condition preceding its taking.

The Court: Well you had better get that evidence in there.

Mr. Currey: Well it results in my withdrawing Mr.

Wag*ner* until I can get some authorities to hand up to the court.

The Court: Well I don't think this evidence is competent now.

Mr. Thompson: Your honor, the agreement is with reference to the trade.

The Court: Yes, but you can't contradict the terms of a written instrument by parole evidence.

Mr. Thompson: We are not seeking to do that.

The Court: You haven't got—that evidence isn't competent now.

Mr. Currey: Why can not the court hear the evidence and pass on it?

The Court: Well if you have these other things here there is no use for that. That evidence may not be competent at all.

Mr. Currey: Well in view of the ruling of the court the defendant offers to show by the witness on the stand that he is well acquainted with Dallas Hopper——

The Court: No, sir, you ask him and I will exclude it. You are not showing anything. You ask him and I will exclude it.

Mr. Currey: The court refuses to let me make an offer?

The Court: No, sir, you prove what he says and I will exclude it from the record.

Q. Well you may state then, Mr. Wagoner, what was said between you and Hopper, what conversation you had with him and Leander J. Fish with reference to the execution or the taking of a lease by Mr. Hopper from Leander J. Fish about the 29th day of April, 1912

Mr. Ewert: Objected to as incompetent, irrelevant and immaterial and no foundation laid, no predicate laid and apparently seeking to vary the terms of a written instrument with respect to consideration.

The Court: Let him answer and I will rule on it.

A. Well in the first place Mr. Hopper owed me some money. I was asking him about this money and he came in to me. He run the pool hall across the alley from my store and said he could get a lease from Mr. Fish that he could sell and get some money out of. I told him all right, and then he offered to put me in as a partner in the lease and I objected to that, didn't want to be connected with it. So he went ahead and

made his own arrangements. About the next day they drove a team up in front of my store that he was to give Mr. Fish.

The Court: How do you know he was to give it?

A. He said he was; asked me to go on his note to buy the team to give to Mr. Fish. I refused to go on the note.

Q. Now who was the fellow that drove the team up?

A. Forrest Rawlings drove the team in.

Q. Is Forrest Rawlings living or dead?

The Court: All this evidence is excluded on the ground that no predicate is laid for it. This don't show it is a part of the proceedings that made the contract; it is hearsay and it would have the effect of changing the terms of the written instrument by parole evidence. In view of the record at this time this ruling is made and the court determines to control the order in which the evidence will be introduced.

Mr. Currey: I will have to withdraw Mr. Wagoner.

(Witness dismissed.)

JOSEPH P. FISH, produced, sworn and examined as a witness for and on behalf of the defendants, testified as follows:

Direct Examination by Mr. Currey.

Q. What is your name? A. Joseph P. Fish.

Q. What was your father's name?

A. Leander J. Fish.

Q. Is that the same Leander J. Fish who executed a lease to Dallas Hopper about the 29th day of April, 1912?

A. Yes, sir.

Q. You are the son of Leander J. Fish? A. Yes, sir.

Q. And as you understand it the plaintiff in this suit now is claiming his rights under this lease that was executed about the 29th day of April, 1912? A. Yes, sir.

Q. Along about the 29th day of April, 1912, where was you? A. About the 29th day of April, 1912?

Q. Yes. A. I was around Miami.

Q. About what age were you at that time?

A. Seventeen years old.

Q. What were your habits with reference to accompanying your father about that period of time?

Mr. Ewert: That is objected to.

The Court: That is sustained. It is a physical fact as to whether he was with him

Q. Was you with your father and did you hear any conversation between Dallas Hopper and your father in regard to the execution of this lease? A. Yes, sir.

Q. Before it was executed? A. Yes, sir.

Q. What was that conversation?

Mr. Ewert: That is objected to on the ground it is incompetent, irrelevant and immaterial and no foundation laid for it in the nature of impeaching testimony, and the foundation not showing that this was at the time the lease was executed, not fixing time or place.

The Court: I will let him testify.

A. They had a conversation there in regard to making Mr. Hopper a mining lease.

Q. What was said between them, give the circumstances.

The Court: When was this?

A. April 29, 1912.

Q. Was that before the lease was executed?

A. Yes, sir. They had two or three conversations.

Q. State whether or not you was present at the time the lease was acknowledged before Mr. Ballard. A. Yes, sir.

Q. Was it before that time? A. Yes, sir.

Q. How long before?

A. Oh, I suppose along in the morning two or three hours before.

Q. State the first conversation that you heard between your father and Dallas Hopper in regard to this lease.

Mr. Ewert: Let's see when it was.

Mr. Currey: I have asked him all I want to ask him on that.

Mr. Ewert: I would like to have him fix the time; he said they had three conversations.

The Court: How long was this before the lease was executed?

A. They were around there together a good part of the day before the lease was executed.

The Court: What time of day was the lease executed?

A. I think right after noon or about noon.

The Court: And this was in the morning?

A. Yes, sir.

The Court: How long before?

A. Oh about ten o'clock I suppose.

The Court: Go ahead.

Q. Go ahead and state.

A. Well Mr. Hopper went after my father for a mining lease.

The Court: State what was said.

A. My father asked him if he was ready to fix up that mining lease and get him the team they had agreed; and Dallas said he thought he was and he would have Mr. Wagoner fix up the note for the team and he was to have $60.00 in money and five per cent royalty. So Dallas Hopper told father to go down and get the team from Mr. Slim Rawlings and let Mr. Wagoner see the team and they would make the lease. On the way up to Mr. Ballard's office father asked him, "You won't put it on record until I get the team." He says: "Yes, we will fix up the lease and get the team." Father says: "You won't put it on record until I get the team will you?" And he said no.

Q. State whether or not you were with your father at any time when he went and got the team? A. Yes, sir.

Mr. Ewert: Let's get the ruling on the other testimony first.

Q. Where did you see the team?

A. The first time at Mr. Rawlings' barn.

Q. Then what happened?

A. Well my father—the team was brought up to Mr. Wagoner's.

Q. Did you see it there? A. Yes, sir.

Q. Were you there with your father? A. Yes, sir.

Q. State whether or not you heard the conversation between Mr. Dallas Hopper and your father and Mr. Wagoner in regard to the team, in regard to the note?

Mr. Ewert: Same objection and hearsay.

A. I didn't hear the conversation between Mr. Wagoner, no, sir.

Q. Now when was the lease executed with reference to the time the team was brought up to Mr. Wagoner's?

A. Well I think it was executed while Slim was bringing it up.

Q. Then state whether or not you went from Mr. Wagoner's place to the notary to have the lease executed.

A. Yes, sir.

Q. State whether or not you left the house, that is the notary's office with Mr. Wagoner.

A. Mr. Wagoner wasn't up there.

Q. I mean with your father. A. Yes, sir.

Q. Now what if anything was said either in the notary's office or after you left the notary's office in regard to the team and the lease and the recording of the lease?

The Court: Now that is improper way to examine this witness. That is extremely leading; this is the boy of the dead man. I will exclude that on the form of the question.

Q. State what if anything was said——

The Court: You say you went down to the notary's office?

A. Yes, sir.

The Court: Who was the notary?

A. O. B. Ballard.

The Court: Who was there?

A. Well there were a couple of men there and Mr. Ballard and Mr. Hopper and father and myself.

The Court: Who went with you down there?

A. Mr. Hopper.

The Court: How long were you there?

A. I don't suppose very long. Just long enough to draw up the lease and acknowledge it.

The Court: Who wrote the lease?

A. Mr. Ballard if I am not mistaken.

The Court: Who stated the terms to him?

A. Well it was just a common form, he was a kind of real estate man.

The Court: He didn't know anything about the lease until you went down there did he?

A. I don't think so, I don't know.

The Court: Who requested him to draw the lease?

A. Mr. Hopper.

The Court: Was your father present?

A. Yes, sir.

The Court: Who stated to him about what lands it was on?

A. Mr. Hopper and father both what the description of the land was.

The Court: Both told him the terms?

A. Five per cent and so on and so forth.

The Court: Told him the terms of the contract?

A. Yes, sir.

The Court: Who left that room first?

A. Well my father and Mr. Hopper and all of us went out together.

The Court: Where did you go then?

A. My father says, "We will go on down to Mr. Wagoner's now will we?" And Mr. Hopper says yes; and father says: "You won't record that lease until I get the team?" And Mr. Hopper said no he wouldn't. So my father went on down to Mr. Wagoner's and asked where Slim was and where the team was, and I think Mr. Wagoner refused to sign the note.

The Court: Did Mr. Hopper go with you down to Mr. Wagoner's?

A. No, sir.

The Court: Was he present when he asked Mr. Wagoner about that?

A. No, sir.

The Court: Go ahead.

Q. Now who was it wasn't present when he asked Mr. Wagoner?

The Court: He said Mr. Hopper.

A. You mean when my father asked Mr. Wagoner for Slim?

The Court: Yes.

A. No, sir, Mr. Hopper wasn't there.

Q. Then what took place?

A. I think Mr. Hopper told my father Wagoner wouldn't sign the notes or he had backed up or something of the sort and he might find some one else.

Mr. Ewert: This goes in under the same objection made at the beginning.

The Court: Very well.

Q. What else was said?

A. I don't remember just all that was said.

Q. Subsequent to that time did you hear any conversation between your father and Dallas Hopper?

A. They had three or four talks about the lease. Mr. Hopper had been after him to get a lease.

The Court: After the lease was executed?

Q. After this time; I was asking whether after this time and between the date of these things you have been testifying to whether you heard any conversation between your father and Hopper in regard to the lease. A. Yes, sir.

Q. What was that conversation?

Mr. Ewert: That is objected to as antedating the time.

The Court: When was that conversation?

A. Well they had another conversation about two or three days after that.

The Court: Where abouts?

A. I think it was there in Miami.

The Court: Where about in Miami?

A. I don't know just the exact spot.

The Court: Who was present?

A. Mr. Hopper and my father and myself.

The Court: Now this man is an heir?

Mr. Currey: He is a son.

The Court: Now I excluded the evidence of Hopper on the ground that he—go ahead.

Q. What was that conversation?

A. My father told him he hadn't got the team and he wanted him to turn the lease over to him and asked him why he recorded it.

Q. What did Hopper say?

The Court: No that was after the transaction had taken place, you needn't answer. That certainly is impeaching evidence.

Mr. Currey: You may take the witness.

Cross Examination by Mr. Ewert.

Q. Mr. Fish were all the conversations that you have related or attempted to relate conversations that occurred on this one day the 29th day of April, 1912? A. No, sir.

Q. When were they? A. Well they had three or four.

Q. When was the first conversation?

Mr. Ewert: May it please the court until the definite ruling is made I don't want to lay myself, and I reserve that right, I don't want to lay the plaintiff open to a waiving of any rights by cross examining this witness.

The Court: You don't waive that, that is specially understood; I want to look up to see whether or not he being the heir of Leander J. Fish whether or not that——

Mr. Ewert: May it please the court, would you let me state my views on that? I think that the foundation they have laid is not sufficient, but on the ground of qualification I am confident it would be error to exclude the evidence of Joe Fish if the proper foundation is laid. I think your honor has made a mistake in ruling out the Hopper testimony and I want to argue that.

The Court: I don't think there is any doubt about that. You sought to introduce Hopper who had acquired title from the deceased.

Mr. Ewert: In the case of Hopper he took the lease, then he sold all of his interest in that lease. He was no longer interested in it. Then he took a sublease later on from the man to whom he had sold in good faith.

The Court: I understand, but the Supreme Court of Oklahoma has specifically held that that is incompetent. Whether they are right or wrong that is binding on this court.

Mr. Ewert: I don't want to make any objection on the ground of competency because our lease is too nearly expired. I think the questions if properly asked would be competent. It would look inconsistent for me to argue both ways.

The Court: You offered your evidence and the court excluded it. Then you made your objection upon the theory of the court.

Mr. Ewert: Well suppose we leave this open the question of the competency of that evidence until it is argued finally.

The Court: Very well, I will give you permission to object to that later. You object on the ground that his evidence is incompetent by reason of being an heir of the estate of Leander J. Fish.

Mr. Ewert: But I do reserve the other objections I have made.

The Court: You reserve them all.

Q. Will you state the first of these conversations now concerning which you have testified, where did it occur and when did it occur relative to the execution of this lease?

A. This I just recited occurred that day.

Q. Well you say that all this talk about the giving of a note and the bringing out of the team all occurred on the morning of the 29th of April, 1912? A. Those I just recited?

Q. Well that is what you have testified to. Now were you with your father all the time that morning?

A. I was with him most of the time.

Q. Now you just refresh your recollection, you stated you went from Wagoner's place with your father and Hopper up to the notary's office, that was Mr. Ballard, are you sure of that?

A. I think we went out of the pool hall and through Mr. Wagoner's place.

Q. You went out of the pool hall and went from there to Wagoner's place? A. Yes, sir.

Q. And then you had the talk with Wagoner and then went to Ballard's? A. Yes, sir.

Q. Now I ask you if it isn't a fact that that conversation relative to the lease occurred in the back of the pool hall then managed or operated by Mr. Hopper, the Ben Dardeen Pool Hall, and if it isn't a fact on that day when you started out or when Fish and Hopper started out that you stayed in the pool hall with Abb Jones and didn't go to the notary's office at all? A. No, sir, that is wrong.

Q. And you say now you were present when that lease was executed? A. Yes, sir, I was right there.

Q. And you saw Mr. Ballard writing up the lease?

A. He filled it in.

Q. Mr. Ballard didn't grab that out of the air, some one told him about that, your father was there?

A. He was there, yes, sir.

Q. It was read over to them wasn't it? A. Yes, sir.

Q. And he signed it? A. Yes, sir.

Q. And the lease was then turned over to Hopper?

A. Yes, sir.

Q. And Hopper and your father went out? A. Yes, sir.

Mr. Ewert: I think that is all.

Mr. Currey: That is all Mr. Fish.

(Witness dismissed.)

W. A. WAGONER, recalled for further examination testified as follows:

Direct Examination by Mr. Currey.

Q. You are the same Mr. Wagoner that was on the witness stand just preceding Mr. Fish? A. Yes, sir.

Q. There was in 1912 a pool hall right adjacent to your store? A. Just across the alley from my back door.

Q. And who run that pool hall? A. Ben Dardeen.

Q. Who worked in there?

A. Dallas Hopper was working there at that time.

Q. State whether or not about the 29th day of April, 1912, you had any conversation with Hopper and Mr. Fish in the pool hall there with reference to a lease to be executed by Mr. Fish to Mr. Hopper?

Mr. Ewert: That is objected to as incompetent, irrelevant and immaterial, no foundation being laid.

The Court: Go ahead.

Q. And state what their conversation was?

A. Mr. Fish came across the alley and asked me to come over to the pool hall, that Dallas Hopper wanted to see me, and I went over with Mr. Fish and they had closed the terms on the lease.

The Court: Why do you say they had closed the deal?

A. They said they had.

The Court: In the presence of each other?

A. Yes, sir.

Mr. Ewert: Then I object to the occurrence subsequent to the time of executing the lease.

The Court: Very well, I will let him answer and pass on it later.

A. They went on away after talking a little while about it.

Q. Tell what all was said there at that time.

A. Well they had closed the lease and he was to pay him I think five per cent and Dallas wanted to put my money in the lease and I told him no. He offered to put me in for a half interest. And after that argument they went off to fix the lease and I went back to the store.

Mr. Ewert: I move to strike all that out as entirely incompetent.

The Court: Well you may have your objection incompetent, irrelevant, immaterial, no predicate, seeks to vary a written instrument. I will reserve my ruling.

A. Well after they signed up and fixed up the lease they brought a team up to the store.

Q. Who do you mean by "they"?

A. Mr. Rawlings, they had agreed——

The Court: How do you know?

A. Mr. Rawlings said they did.

The Court: That is stricken out.

A. They was all there together.

The Court: I think you had better ask him the questions.

Q. Don't state anything excepting when Mr. Fish and Hopper was present. Now if there was anything said in regard to the team when Fish and Hopper were present now you may tell what it was.

The Court: When was it, before or after the contract was entered into?

A. This was just after the lease had been made as I un-

derstood it and the team was there in front of the store and they were looking at the team and they had agreed on the price and then Dallas wanted me to sign his note for the team.

Q. Was Fish there and Dallas? A. Yes, sir.

Q. Well can't you tell what was said between them?

A. They agreed on the price of the team, $250.00 I understood.

Mr. Ewert: I insist he say what was said by Hopper and by Fish.

Q. State the substance of the conversation if you can.

A. Well the team was considered *with* $250.00 and the deal was closed all but me signing the note.

The Court: I rule out the answer that the deal was closed, that is merely an opinion.

Q. Yes, what did they say about it?

A. I said they had agreed on the price of the team.

The Court: I rule that out. The only thing I will let the witness testify subject to my ruling on the objection is what was said.

Q. You can't draw your conclusions and say that they had done this or that, state the substance of what they said; if they talked you know they said something.

A. Mr. Hopper and Mr. Fish was talking about the value of the team.

The Court: Well what did each one say? You are a reasonable man, you can testify intelligently; now what did Hopper say and what did Fish say in substance according to your best recollection?

A. Hopper wanted me to sign his note for the team.

The Court: Well did he ask you to sign it?

A. Yes, sir.

The Court: Well why don't you say he asked you?

A. That is what I am trying to say.

Q. What did you tell him? A. I told him no, sir.

Q. Then what was said between Fish and Hopper?

A. They left there then and I afterwards learned that they didn't get the team.

Q. That is the last of the conversation?

A. Yes, sir, they all left my place when I wouldn't sign the note for the team.

Q. Was the man that owned the team there too?

A. Yes, sir.

Q. State whether or not he left? A. Yes, sir.

Q. State whether or not they all left together?

A. Mr. Rawlings stayed there some time after they left.
Q. Mr. Rawlings is dead isn't he?
A. Yes, sir, he died last fall of the flu.
Q. Last fall? A. Yes, sir.

Mr. Currey: That is all, take the witness.

Mr. Ewert: We have no cross examination on that.

(Witness dismissed)

Mr. Currey: Now Mr. Wagoner wants to be excused.

Mr. Ewert: No objection.

The Court: Very well.

Mr. Ewert: I take it a formal motion to strike all this will not be necessary.

The Court: Very well, it is understood I will pass on it.

C. H. PLUMB, produced, sworn and examined as a witness for and on behalf of the defendants, testified as follows:

Direct Examination by Mr. Thompson.

Q. State your name? A. C. H. Plumb.
Q. Where do you reside? A. Joplin, Missouri.
Q. How old are you? A. Forty-three.
Q. What is your business? A. Mining engineer.
Q. How long have you been engaged in that business?
A. Oh, since 1900.
Q. Have you ever been interested in what is known as the Miami Field? A. Yes, sir.
Q. Have you been interested in mining on the Fish land?
A. Yes, sir.
Q. And for whom?
A. Well I was interested for Church and Mabon first and then later for myself.
Q. You were interested with Mr. Dike in the Montreal?
A. Yes, sir.
Q. Mr. Plumb, have you any record of the logs of drilling done upon the Fish land? A. Yes, sir.
Q. I wish you would examine this book that I hand you and state whether or not it contains the logs of the holes drilled upon the Fish land.
A. Yes, sir, this book is the log book.
Q. I ask you now——

The Court: Who are the parties defendant to this suit.

Mr. Thompson: W. M. Smith.

The Court: Now what is the object of introducing this evidence about improvements and things like that? It is my understanding they are not asking for recovery for damages.

Mr. Thompson: Your honor, the petition in this case filed by the plaintiff alleges that after the execution of what is known as the Hopper lease, April 29, 1912, they immediately took possession and did a great deal of drilling and shaft sinking and expended a great deal of money on the property. Our defense is that their lease has been abandoned and we show what we have done.

Mr. Ewert: Now at this time here is all there is in this law suit and that is the validity of the lease in question.

The Court: Suppose the court would hold your lease was valid, what would you do then?

Mr. Ewert: Of course we will have an action for damages, but we have to establish the validity of this lease. All that is left is this——

The Court: You could have recovered and had an accounting in this proceeding. The question is whether or not when you bring this suit whether or not you have waived that. You could have amended your petition.

Mr. Ewert: We might have done that but no one could foresee the events.

The Court: Go ahead. I will let him answer this. This evidence is competent upon the theory that you have abandoned your lease.

Mr. Ewert: Let this be understood however, your honor, our testimony shows that we began work upon this property——

The Court: Go ahead.

Mr. Ewert: We will make the offer at the time.

Q. Kindly examine Defendant's Exhibit #6 and state whether or not you recognize that as your work?

A. Yes, sir, that is work that I had done for me. I didn't draw the map personally.

Q. You furnished the data did you? A. Yes, sir.

Q. Now examining the log book I wish you would look at page 7 thereof and state whether or not it shows a log of a hole drilled upon this land. A. Yes, sir.

Q. And can you give the date of it?

A. This hole was the first hole put down under the Church-Mabon lease and this record was not made by me——

Mr. Ewert: We object to it then incompetent, hearsay, not the best evidence.

A. This is the original log book.

Mr. Ewert: Originated by whom?

A. This was made by Mr. Church himself.

Q. That is the log book of the Church-Mabon Mining Company? A. Yes, sir.

Q. And that is the book in which they kept the logs?

A. Yes, sir.

Mr. Ewert: Still objected to for the same reason.

The Court: What reason?

Mr. Ewert: Upon the ground no foundation laid, not the best evidence.

The Court: He testified that is the original log book.

Mr. Ewert: Yes, but he didn't make it.

A. I just testified Mr. Church made this record.

Mr. Ewert: How do you know?

A. It is in his handwriting.

Q. Did you have charge of the field work for the Church-Mabon Mining Company? A. Yes, sir.

The Court: Who is Mr. Church?

A. He was one of the original owners of this lease under Mr. Smith.

The Court: Was he an engineer and driller?

A. Mining engineer.

The Court: Did he do the drilling?

A. He had charge of it.

Mr. Ewert: How do you know?

The Court: Do you know that of your own knowledge, did you ever see him out there?

A. Well possibly he didn't have exact charge of it but the drilling was being done for him and I know he knew all about the subsequent drilling.

The Court: Whose duty is it to make the log book, the driller isn't it?

A. Some times the log is made by the driller.

The Court: According to approved mining engineering and development whose duty is it to keep the log?

A. The engineer. I made all the logs——

The Court: Before you introduce that you will have to show that it was made by the engineer in charge.

Mr. Thompson: We will offer it, if the court please, as the log book of the Church-Mabon Mining Company.

The Court: I understand but you have first to show it was made in due course.

Mr. Thompson: Well this witness testified that this book contains all of the logs of the whole drilling.

The Court: He don't know.

Mr. Thompson: He says he does.

The Court: How do you know it contains all the logs?

A. It contains—I couldn't say it contains all that were ever drilled by Church & Mabon, but it contains all that were drilled on this land.

The Court: How do you know?

A. Because I went over and located all these holes, surveyed them and platted them and some of them I checked up myself.

The Court: You didn't see that log book made?

A. No, except where I started.

The Court: All right if you want to take your chances all right.

Mr. Ewert: Another thing I wish to direct the attention of the court to.

The Court: If you want to make any objection or ask any questions go ahead.

Mr. Ewert: Mr. Plumb isn't it a fact that the driller himself makes the logs as he goes along so many feet such and such formation, and isn't it a fact the original logs are now in court here in the handwriting of the man who made those logs?

A. No, I made the logs myself. The driller never gave me a scratch of a pen except these first five holes which were drilled before I took charge.

Mr. Ewert: Isn't it the custom of the driller to make a record of the logs and furnish those original logs to the owner of the land or the man for whom he does the drilling?

A. It is a custom followed by a great many but not all.

Mr. Ewert: And wasn't it followed in this case?

A. No, sir, in other words we thought we were better capable of telling the formation than the driller and we did so.

Mr. Ewert: At what point in that book do the notations in that book come in your handwriting?

A. Hole number 5 is in my handwriting. No hole number 4 is in my handwriting.

The Court: Go ahead.

Q. Now referring to page 8, Mr. Plumb, does that page contain a log of a hole drilled under the Church-Mabon contract or lease under the Smith lease upon the Fish land?

Mr. Ewert: That is objected to as incompetent, no foundation laid and not the best evidence, hearsay because he has testified that that is in the handwriting of Mr. Church.

The Court: Is that in the handwriting or Mr. Church?

A. Yes, sir.

The Court: I don't believe that is established.

Q. You have checked these logs with the data taken from drilling in making this map?

A. I personally went over the cuttings myself and examined them to see if there was any ore.

The Court: Did you check up the drilling?

A. Not in detail.

The Court: He can't testify.

Mr. Thompson: Your honor, there has been testimony offered in the Unkle suit men who never did that drilling testified as to the contents of the holes.

Mr. Ewert: Testified as to the cuttings.

The Court: Very well I will exclude that.

Q. Mr. Plumb, the point I am getting at is this, do you know of your own knowledge that hole Number 1. which I have referred to as being on page 7, and hole No. 2 was drilled by Church and Mabon?

A. Yes, sir, I moved the drill off the holes.

Q. And upon the Fish land? A. Yes, sir.

Q. Referring to the log on page 10, known as hole No. 3, do you know from your own investigation that that was a hole drilled?

A. Yes, I found the hole and found the cuttings. I didn't make the log.

Q. And referring to page 11, known as hole No. 4, is that a log of a hole that was drilled?

A. I moved the drill off of this, I made this log myself from the cuttings.

The Court: That is competent.

A. That hole was an abandoned hole.

Q. Now those four holes Mr. Plumb were drilled prior to what date?

A. They were drilled prior to the first of October, 1914.

Q. Now at that time were you employed by the Church-Mabon interests?

A. I started with them—well I think on the first day of October, 1914.

Q. And from then on what were your duties?

A. I had charge of the drilling and outside development.

Mr. Thompson: Now if the court please we offer in evidence these logs found on pages 7, 8, 10 and 11.

The Court: You may introduce the logs he testified he made. He says he don't know about the others.

Q. Of these four logs which ones did you make?

A. I made No. 4.

Q. That is on what page? A. Page 11.

Q. Are there any other logs upon that page?

A. Yes, sir, it is the second hole recorded on that page.

Mr. Thompson: We now offer in evidence Defendants' Exhibit No. 7.

Mr. Ewert: Now your honor of course the same general objection as to that. It isn't quite specific enough.

The Court: Did you make Exhibit No. 7?

A. Yes, sir, I made the log of the hole.

The Court: Very well.

Mr. Ewert: May the record show that that is No. 24?

Mr. Thompson: It is "Fish Land #4." The stenographer has identified that particular log as Defendants' Exhibit Number 7.

Q. Now passing Mr. Plumb to the log of hole No. 5 on page 13, that was drilled under your supervision, is that log in your handwriting?

A. Yes, sir, that hole was completed under my supervision, it was started before. I made the log of the hole.

Q. And does it show the date?

A. It was completed the 18th day of October, 1914. That is hole No. 5; if that was in September it wasn't completed under my supervision. I made the log from the cuttings.

Mr. Thompson: We now offer in evidence Defendant's Exhibit No. 8.

Mr. Ewert: Now may it be understood that all this testimony with respect to the development work is objected to upon the ground it is incompetent. It doesn't show an abandonment upon the part of the plaintiff of his lease, and it is further incompetent because if our lease is valid and they are in possession that wouldn't make any difference how much work they did upon our ground.

The Court: When were these holes drilled?

A. Well this was completed September 18, 1914, and all these other four were prior to that time, in fact in the summer of 1914.

Mr. Ewert: And may that objection run through all this testimony?

The Court: Very well.

Q. Mr. Plumb I wish you would examine your log book and give the reference to the numbers of the logs and the page of your book of all holes drilled under your supervision and under the Smith lease from the time you had charge of this work and up to the 5th day of May, 1915.

A. Do you wish me to run through the book and find them?

Q. Yes. A. Well hole number 6, page 25.

Q. Are each of those logs numbered so you can refer to them as number and page?

A. They are paged. They are numbered in several different ways, this is number 6.

Mr. Thompson: We now offer Defendant's Exhibit No. 9.

A. That was started October 26th and completed November 16, 1914. The next hole No. 7 was started November 16th completed December 3rd, page 37.

Mr. Thompson: We now offer in evidence Defendant's Exhibit No. 10.

A. Then page 39 is Fish hole No. 8, started December 4th and completed January 14, 1915; that is page 39.

Mr. Thompson: We offer in evidence Defendant's Exhibit No. 11.

A. Then hole No. 9, page 48, started January 20th and completed February 13, 1915.

Mr. Thompson: We offer in evidence Defendant's Exhibit No. 12.

A. Then the next hole No. 10, page 51, was started February 15, 1915, and completed March 2, 1915.

Mr. Thompson: Defendants offer Defendant's Exhibit No. 13.

A. Hole number 11, on page 56, started the 6th day of March, 1915, completed the 17th of March, 1915.

Mr. Thompson: Defendants offer Defendant's Exhibit No. 14.

A. Hole number 12, page 64, started the 25th day of March and completed the 13th day of April, 1915.

Mr. Thompson: Defendants offer Defendant's Exhibit No. 15.

A. Hole number 13, on page 72, was started April 14, 1915, completed April 24, 1915.

Mr. Thompson: Defendants offer Defendant's Exhibit No. 16.

A. Hole number 14, page 75, started March 18, 1915, completed April 28, 1915.

Mr. Thompson: Defendants offer Defendant's Exhibit No. 17.

A. Hole number 15, on page 82, was started April 25, 1915, completed May 5, 1915.

Mr. Thompson: Defendants offer Defendant's Exhibit No. 18.

Q. Now Mr. Plumb how many of those holes that you have designated were drilled on the land in question in this lawsuit? A. The lawsuit involves the whole two hundred acres?

Q. No, the lawsuit involves 120 acres, excluding the Montreal forty and the forty immediately south.

A. The first eight holes out of these fifteen are on the 120.

Q. And they were all drilled prior to March or May, 1915?

A. Yes, sir.

Q. As a matter of fact these eight holes were drilled prior to October, 1914?

A. I don't remember the date of the eighth hole.

Q. Well they were drilled prior to May 5, 1915?

A. Yes, sir.

Q. And the remaining of these logs where were those holes drilled? A. They were drilled on the Montreal forty.

Q. I hand you a slip, Mr. Plumb. that you prepared for me and ask you to refresh your memory from it as to what the balance of those logs are that you are referring to there.

A. This is just a notation I made from the log book.

Q. That carries the drilling up to what date?

A. Of the balance of the holes drilled under my supervision on the Fish land, that makes thirty-four holes in all; the first four of which I did not have supervision over.

Q. I wish you would take that and referring to the book give the number of the log and the page of the book so it may

be identified by the stenographer so that the log may be copied into the record.

Mr. Ewert: Let me ask a preliminary question. The logs he is now questioning you about how many were drilled on the 120 here in question?

A. You mean of the whole?

Mr. Ewert: Yes, that he is now asking you about, how many of those holes were drilled on the land here in question?

A. The first eight and I think one of the balance was on the 220. I could tell by looking at the map.

Mr. Ewert: There is no use putting all this in; in the nature of these improvements like in the case of the Montreal; when the time comes we will argue the question of competency. Now that Montreal forty about which Mr. Dike testified isn't on this land at all.

The Court: They can't prove anything not on this land. Anything other than on this land will be excluded.

Mr. Thompson: If the court please we are attempting to show that the question of possession was in good faith; we are attempting to show what we have done under our lease: we are certainly entitled to show that.

The Court: No, I will not permit you to prove anything except what you did on this land in controversy.

Mr. Currey: Our theory of this case is entirely different from their theory. We may be entirely wrong when we come to argue the case; we think they are entirely wrong now.

The Court: How many acres in this Hopper lease?

Mr. Ewert: 120, they took the whole allotment.

The Court: I will exclude all the evidence of all drilling on the eighty acres of land not included in this 120 acres in controversy.

Mr. Thompson: Your honor will recall the evidence of the plaintiffs they attempted to show that prior to the time they started the shaft May 8, 1915, there had been no work done upon the property by Smith. Of course we are now showing and have disclosed eight holes.

The Court: You can't duplicate their lease and get eighty acres besides and improve on the land not in controversy and say we have gone on this lease.

Mr. Thompson: The only party that could complain is the landlord.

The Court: I will let it in but I don't consider that has any probative effect.

Mr. Ewert: Exception.

Q. At the time Mr. Plumb that you were supervising this drilling——

The Court: On the contrary I think that would have a tendency to show bad faith.

Mr. Thompson: As to whom if the court please?

The Court: I think this, I think in place of helping you that evidence would show bad faith. You say these other people had abandoned their lease, we have covered their ground with another lease and have taken eighty acres besides but show practically all the drilling was on the outside I think that is against you rather than for you.

Mr. Thompson: Your honor, we are going step by step.

The Court: All right.

Q. Between the dates, Mr. Plumb, that you took charge of this drilling in 1914 and May, 1915, were you actively in charge and upon the property? A. Yes, sir.

Q. How frequently were you there? A. Every day.

Q. Did you observe anybody drilling upon the entire 200 acre tract?

Mr. Ewert: Now that is objected to. May it be confined to this 120?

The Court: That calls for a conclusion.

Mr. Thompson: If the court please I would like to have the gentleman wait until I ask my question. If counsel would have waited I would have excepted this in here.

The Court: Very well.

Q. Was there anybody between those dates drilling upon any part of the Fish allotment except yourself? A. No, sir.

Mr. Ewert: Move that that be stricken out upon the ground that it is a conclusion.

A. I know there wasn't, I was there every day over the land.

Q. Now Mr. Plumb when if at any time did you ever observe——

The Court: Is this the case where they arrested them for drilling and things like that?

Mr. Ewert: Yes.

The Court: Very well, go ahead.

Mr. Thompson: That was just a short time ago.

Q. When if at any time subsequent to May 1st did you observe any one on the ground or any part of the 120 acre tract? A. After May 1, 1915?

Q. Yes.

A. Well we made our strike on the Fish land you might say the first of May or May 5, 1915, we had never seen anybody there, nobody had ever claimed possession to me or said that they had any interest in the property until after they made the strike.

Q. Please refer to the log that you refer to as being the strike and give the date.

A. That is Fish hole number 15, page 82, started April 25, 1915, and completed May 5, 1915.

Q. And that was the hole in which you found very fine ore?

A. Yes, sir.

Q. And following that what happened Mr. Plumb with respect to other parties not interested with you coming upon the 120 acre tract?

A. After we made this strike then a man by the name of Beth the first I knew there was any controversy this man Beth came on the property and said that that was his lease and for us to get off. We never had heard of the man before.

Q. Then following it up was there any work done or attempted to be done by Mr. Hopper or Mr. McCullough and if so when?

A. A very short time after Mr. Hopper showed up on the southeast forty and built him a little house or erected a tent and started to sink a shaft up in the brush.

Q. When was that?

A. That was after this strike was made.

Q. How soon after?

A. I think quite soon after the strike was made.

The Court: Was it within a month?

A. I think it was less than a month.

Q. Well he started a shaft did he? A. Started a shaft.

Q. Had there been any drilling near that point? A. No.

Q. And how deep did he sink that shaft?

Mr. Ewert: When you say there hadn't been you are referring from October, 1914, up to May 8th?

A. I went all over the forty and located every hole on it. I am talking about what I didn't see.

Mr. Ewert: How could you know if there had been holes plowed up for five years?

A. They were plugged.

Mr. Ewert: The ground was being worked and plowed?

A. Very small portion of it.

Mr. Ewert: You say there had been no drilling done upon this ground?

Mr. Thompson: Your honor, I object to cross examination at this time.

The Court: You may cross examine.

Q. How deep was that shaft sunk?

A. I can tell from looking at the map.

Q. I want you to take your memorandum and designate the logs and the number thereof and the page on which you find them of this book and give them to the stenographer so that he may identify them, that is the balance of the thirty-five logs that you have there. A. Hole 16 is on page 89.

Mr. Ewert: May it be understood that is going in over our objection.

Mr. Thompson: We now offer in evidence Defendant's Exhibit No. 19.

A. Hole number 17 is on page 91.

Mr. Thompson: We now offer Defendant's Exhibit No. 20.

A. Hole number 18 is on page 96.

Mr. Thompson: We now offer Defendant's Exhibit No. 21.

A. Hole number 19 is on page 97.

Mr. Thompson: We offer Defendant's Exhibit No. 22.

Q. Mr. Plumb do these follow in order now the balance of the thirty-five?

A. Hole number 20 is on page 107. They don't follow in order.

Mr. Thompson: We now offer Defendant's Exhibit No. 23.

A. Hole 21 is on page 108.

Mr. Thompson: We offer Defendant's Exhibit No. 24.

A. Hole number 22 is on page 111.

Mr. Thompson: We offer Defendant's Exhibit No. 25.

A. Hole number 23 is on page 112; hole number 24 on page 113.

Mr. Thompson: We offer Defendant's Exhibits No. 26 and No. 27.

A. Hole number 25, page 116.

Mr. Thompson: We offer Defendant's Exhibit No. 28.

A. Hole number 26 and number 27, on pages 118 and 119.

Mr. Thompson: We offer in evidence Defendant's Exhibits No. 29 and No. 30.

A. Hole number 28 on page 125.

Mr. Thompson: We offer in evidence Defendant's Exhibit No. *21*.

Q. Now I wish you would take what has been marked for identification as Defendant's Exhibit No. 6 and describe to the court what that is.

A. This is a map of the Fish land showing 200 acres with the drilling on each forty brought down to November 12, 1917.

Q. And for what purpose was that prepared?

A. That was prepared at the time the injunction was brought against us drilling or interfering with the drilling on the northeast of the northwest.

Q. That was at the time the matter was before Judge Campbell? A. Yes, sir.

Q. Mr. Plumb, do you show upon that map all of the drilling done under the Smith lease on each separate and distinct forty? A. Yes, sir.

Q. I wish you would give it from the map to the court giving each forty.

A. The southeast of the northeast, which was a part of the 120 acre lease, had a total number of holes of 12 on it, total 1247 feet, cost $1358.10.

Mr. Ewert: Now may it please the court somebody has to pay for this record. This is brought way down to 1917. How can it possibly be material what work they did, if it is material at all on any of it, after the suit was instituted?

The Court: I don't think it is material after the suit is instituted.

Mr. Thompson: If the court please, the plaintiff has produced witnesses who testified as late as two months ago and I objected and your honor pinned me down and at that time we did determine not to go into it and the plaintiff did. We didn't offer any evidence after the court forced us to take that position. We are seeking to show what we have done as well as the plaintiffs.

The Court: The court enjoined them as to one of those forties. I will not permit you to introduce that map.

Mr. Thompson: Your honor please, that map is prepared from the data in detail.

The Court: I will not permit you to introduce the map.

Q. Well now referring to the southeast forty, Mr. Plumb, how many feet does that show was drilled by Church and Mabon under the Smith lease? A. 1247 feet.

Mr. Ewert: Your honor please I think he ought to lay the foundation for this. He has a map with all the holes that have been drilled.

The Court: He may just testify about his own knowledge.

Mr. Thompson: I understand he is if the court please.

Q. Was that drilling done under your supervision, Mr. Plumb? A. Not all of it.

Q. Does this log book show the logs?

A. Not all of that. There was some later drilling that I surveyed.

Q. As a surveyor however you did locate these holes upon each forty? A. Yes, sir.

Q. And you have described and located those holes upon this map? A. Yes, sir.

Q. Now these holes that you have described as having been drilled on the southeast forty were there any surrounding those holes drilled by the Hopper or McCullough bunch?

A. I don't think I showed their holes at all—yes I showed one or two of their holes and marked them that way.

Q. Now with reference to the forty immediately west of the Montreal I will ask you to state what the map shows and what you do know with reference to the drilling done upon that under the Smith lease?

A. Well there were three holes drilled on the forty prior to the suit.

Q. Filing of the suit?

A. When was the date of the filing of the suit?

Q. I think it was July 1, 1916.

A. Oh, there were more than that. That was prior to the strike, there must have been about fourteen holes prior to the suit.

Q. That is on the forty immediately west of the Montreal?

A. Yes.

Q. Then after that, Mr. Plumb, after the suit was filed how many holes were drilled on the forty west of the Montreal under the Smith lease? A. Eighteen holes.

Q. And that was done by whom?

A. That was done under a lease that I had a sublease.
Q. You and Mr. Wilkins? A. Yes, sir.
Q. What time did you acquire your lease there?
A. We got our lease on June 9, 1917.
Q. And what did you do with reference to going to work?
A. We had two drills on there on the 16th.
Q. And how long did it take to drill those eighteen holes?

Mr. Ewert: Now, your honor, he is now detailing drilling done in 1917 after this suit was instituted and my client is a poor man and why pile up this record with a lot of things that your honor has held can't be material. He is trying to put in the drilling that was done after this suit was filed.

Mr. Thompson: Your honor, this is the condition: plaintiff offered witness after witness as to what happened on this particular forty in October or November, 1917, and we are now attempting to show that this witness himself was conducting drilling there when they claim that they were thrown off. I want to show the facts. You have one side of it.

The Court: I don't see this evidence is helping you.

Mr. Thompson: Well, your honor heard the other side of it

The Court: Yes, they offer that to show that they tried to work, tried to develop. I think this tends to corroborate them rather than rebut it. They show they didn't make it because other people had taken possession and they couldn't.

Mr. Thompson: Our theory is that they have not acted in good faith. We have showed that they never bothered the property until we made the strike on May 5, 1915.

The Court: I think that is all right. Go on and introduce it if you want to. According to my way of seeing it it doesn't have any probative effect.

Mr. Thompson: It is an interference we are trying to show, not a good faith operation. Read the question.

(Question read by the reporter.)

A. It took us about six months.
Q. Now were you drilling there, Mr. Plumb, along in October when Mr. Short or Mr. Hopper came in there?
A. Yes, sir.
Q. And how many drills did you have operating at that time? A. We had two drills.
Q. Prior to that time had you since October, 1914, seen

anybody drilling on this particular forty except Church and Mabon or yourself under a lease from Church and Mabon?

A. I saw drills running under Mr. Dike, that was under the Church-Mabon lease, and while he was drilling there Adam Scott came in and drilled three holes I think claiming under the other lease.

Q. What do you mean by the other lease?

A. The McCullough lease.

Q. When was that Mr. Plumb, about?

A. That must have been during the summer of 1916.

Q. Then you acquired your interest in this forty in June, 1917? A. June, 1917.

Q. And was there any drilling upon this forty by Adam Scott or any one else except under the Smith lease after Scott drilled the three holes and when you were interfered with in the fall of 1917?

A. There was no drilling on that whatever unless it was some drilling done by Mr. Dike.

The Court: Was this one of the three forties covered by the McCullough lease?

Mr. Thompson: Yes, sir.

A. After the three Adam Scott holes there never was a drill upon the lease except under the Smith lease.

Q. Now was there any attempt while you were there drilling attempt to sink a shaft?

A. Well along about the first of October.

The Court: What year?

A. 1917 after we had made a rich strike we came over to the lease one day and found a shaft being sunk.

Q. Who was there conducting this shaft sinking?

A. There were a couple of laborers and shaft sinkers both of whom testified.

The Court: What do you mean by rich strike?

A. Well as I remember we struck ore that assayed about twenty-three per cent if I am not mistaken.

Q. Was that strike afterwards developed, Mr. Plumb?

A. Yes, sir.

Q. A mill built upon it? A. Yes, sir.

Q. It is in operation today? A. Yes, sir.

Q. And that operation is being conducted by whom?

A. By the Quebec Mining Company.

Q. And where did they acquire their rights?

A. From myself and Mr. Wilkins.

Q. That is they bought your lease? A. Yes, sir.

Q. How long has that mill been operating?

A. Since about, well it was the summer of 1918 or the fall.

Q. Have you any interest in any of this 120 acre tract?
A. No, sir.

The Court: Got a royalty interest?

A. No, sir.

Q. Now Mr. Plumb look at this map again and state to the court how many holes have been drilled upon what is known as the Quebec forty, that is the forty immediately west of the Montreal forty, giving the depth and cost.

A. A total of thirty-two holes drilled on the forty, that is 5967 feet, total cost $6927.85.

The Court: Do you mean to say these other gentlemen had gone in there and expended all this money and bought out the interest of all these parties without any guaranty with the knowledge of this lawsuit?

A. Yes, sir, our lease stated that the title was not guaranteed. I had the contract for the lease and they bought my contract.

Q. Does your map show Mr. Plumb how many of those holes were drilled prior to July 1, 1916?

A. Yes, there were fourteen of them drilled prior.

Q. To July 1, 1916? A. Yes, sir.

Q. And have you got that computed with reference to the total footage? A. No.

Q. About what depth were those holes?

A. They were about one hundred and eighty feet.

Q. And what did drilling cost about that time?

A. I think we were paying $1.10.

The Court: I am not going to permit that. I will let you show the character and amount but I will close this case.

Q. Take the forty——

The Court: You can state how many holes were sunk and state how much the aggregate was.

Q. On the forty immediately south of the Quebec being the lands in question, how many holes were drilled under the Smith lease? A. Twenty-nine holes.

Q. And at what depth? A. 5716 feet.

Q. At what cost? A. $7145.00.

Q. Now pass to the forty immediately east of that, how much drilling was done under the Smith lease?

A. Fifteen drill holes.

Q. And what depth? A. 2993 feet.

Q. What cost? A. $2852.10.

Q. Now tell me Mr. Plumb how many holes were drilled

under the Smith lease upon the 120 acre tract involved in this law suit. A. Seventy-three.

Q. And can you tell how many of those were drilled prior to the bringing of this law suit July 1, 1916, if your map shows it? A. I don't think I can.

Q. Now Mr. Plumb how many holes have been drilled under the Smith lease upon the Fish allotment? A. To date?

Q. Yes. A. 199.

Q. Well at the date of your map.

A. November 12, 1917.

Q. How many? A. 199.

Q. And does it show the average depth?

A. Total 36915 feet.

Q. And at what cost? A. $41,619.00.

Q. Now going back to the time Mr. Hopper started a shaft I wish you would examine the map and state where that was located and started and on what described land?

A. It was on the southeast quarter of the northeast quarter, the shaft I stated he started that was sunk to the depth of seven feet.

Q. Was it ever continued on down? A. No, sir.

Q. What kind of mining equipment was put upon it?

A. I don't think even a windlass was put upon it, might have been but I couldn't say.

Q. Do you know of the plaintiffs or any one under them starting any other shafts?

A. They started a second shaft about 100 feet north and a little west which was sunk to the depth of 23 feet.

Q. Was that abandoned? A. That was abandoned.

Q. Do you know of any other shaft they started?

A. There was another shaft started a little northwest of that and sunk to the depth of thirty-five feet, this was the deepest shaft.

Q. Have you gone over this property and looked at these holes Mr. Plumb? A. Yes, sir, measured them.

Q. At the time this map was made was there being any shaft sinking done upon the property by the plaintiffs or any one under them?

A. At the time this map was made they were working at the shaft which I have just stated was thirty-five feet deep and they had been working on it since before June, 1917, in other words they had been working about six months.

Q. And has that been abandoned now?

Mr. Ewert: I object to the use of the word "abandoned."

Q. Well have they ceased working that?

A. I couldn't say.

Q. Now Mr. Plumb with this amount of drilling on the 120 acres totaling seventy-three holes has there been any mineral developed shaft sinking and mining done on the 120 acre tract under the Smith lease? A. Including these 73 holes?

Q. Has there been any mining done or development made upon any part of the 120 acres? A. Under the Smith lease?

Q. Yes. A. Yes, sir.

Q. That is what is known as the Quebec? A. Yes, sir.

Q. Has the drilling other than upon the Quebec developed minable ore?

A. None of the drilling that was done under the Smith lease did, and apparentaly none of the other drilling did.

Mr. Ewert: I move that the words "apparently none of the other drilling" be stricken out.

The Court: That is stricken.

Q. Is there any other mining being done upon the 120 acre tract? A. No, sir.

Q. Has there been any ore produced from any except the Montreal and Quebec? A. No, sir.

Q. How long since you have been upon that property, Mr. Plumb? A. Oh a month or so I guess.

Q. Were you where you could observe and see the southeast forty? A. Yes, sir, went right by it.

Q. Was there any developments down there that looked like mining improvements to you?

A. There might have been somebody working in the shaft but no derricks built.

Q. You can't sink shafts to any reasonable depth at which you find ore without hoists? A. Not very easily.

Q. Well do they do it?

A. It isn't the ordinary practice.

Q. How long have you been mining in that field up there?

A. Beg pardon.

Q. How long have you been mining in the Miami field?

A. Since 1914.

Q. Has there been any ore discovered upon this Fish land to your knowledge at any depth less than one hundred feet?

A. No, sir.

Q. And these shafts that you speak of were sunk to twenty-five or thirty feet?

A. Thirty-five feet was the deepest.

Mr. Thompson: Your honor, I wish you would look at this map.

The Court: No I don't think so, I will not permit it.

Mr. Thompson: We now offer in evidence Defendant's Exhibit No. 6.

The Court: Very well. I exclude it on the ground it encumbers the records, not material to the issues in the case.

Mr. Thompson: I think that is all.

Cross Examination by Mr. Ewert.

Q. Mr. Plumb of the total number of holes the logs of which were introduced in evidence, beginning from number one on down through to the end number 34, please state to the court how many of those were drilled upon the lands here in controversy.

A. I have already stated eight and possibly one more, nine.

Q. And all the remaining logs were drilled on the other tract? A. Yes, sir.

The Court: Drilled on the eighty acres of the Leander J. Fish allotment not included in the Hopper lease?

A. Yes, sir.

Q. Now of the eight that are named by you as having been drilled upon the lands here in controversy will you state to the court in concrete form how many of them were drilled prior to the 8th day of May, 1915?

A. Eight of them, eight of the nine.

Q. Now in a general way testifying from your map you gave and got into the record the total number of holes that were drilled upon the whole tract. Now refresh your recollection from this, if you think you can do it, and state just how many holes were drilled up to the first day of July, 1916, upon first the southeast forty of the Fish land in controversy in this suit. A. First day of July, 1916?

Q. Yes, were there any holes drilled on that southeast forty?

A. There were two holes drilled on the southeast forty.

Q. Will you state what the numbers are so that I can question you about them? A. Number 127 and 226.

Q. When were they drilled?

A. Well number 127 was drilled the one I moved the drill off of the first of October, 1914, then the other hole was drilled in the summer I think of 1915.

Q. Are you sure that you did this drilling in 1914?

A. Number 127 was in 1914.

Q. What date about?

A. I moved the drill off of there the first of October, 1914.

Q. That is when you first went into Church's employ?

A. Yes, sir, the other hole I can't remember.

Q. Was that after that or before?

A. That was after that; I can't remember the circumstances regarding that hole.

Q. Do you remember how deep that hole was, number 127?

A. One hundred fifty feet.

Q. Now then that is all the drilling that was done on that forty? A. Up to that date.

Q. Up to the first day of July, 1916, by you people. Now we will take the southwest forty of the Fish land being the southwest forty of the land here in controversy, and tell the court how many holes were drilled upon that prior to the first day of July, 1916, when this suit was instituted.

A. There were three holes that I am positive of and I can't tell about the rest. There was some drilling that I didn't have charge of but there were three holes I am positive before October, 1914.

Q. Referring to this log book that you have produced do the logs appear in this log book? A. One of them.

Q. Which one is that? A. 127.

Q. I notice there is no date of the drilling as there appears to be on the others, where did you get that memorandum?

A. There is no date to it.

Q. Is that your handwriting?

A. Yes, sir. That is the one I moved the drill off of.

Q. Now give the numbers of the holes that you say were drilled prior to the first day of July, 1916, on the southwest forty. A. Hole 300, 307 and 308.

Q. Where does that appear in the logs? A. Page 13.

Q. That was on the southwest forty? A. Yes, sir.

Q. Then prior to the first day of July, 1916, on this southwest forty you drilled three holes?

A. Three that I know of positively.

Q. And you say you had charge of the drilling during that time up to the first of July, 1916? Now as to the northwest forty here in controversy and commonly spoken of as the Quebec how many holes were drilled on that prior to the first day of July, 1916, if any?

A. There were three holes drilled, four holes drilled, five holes drilled by myself prior to that time and some drilling done by Mr. Dike, which I did not have charge of and couldn't tell the date, but I think most of it was prior to the summer of 1916.

Q. You don't know their number?

A. No, there were seven or eight holes that he drilled.

Q. He did that drilling after he purchased the lease?

A. He didn't purchase that lease.

Q. He acquired an interest in it didn't he?

A. He had an interest in it.

Q. Took a sublease. Now then that is all that was done in the way of drilling up to the first day of July, 1916. Now you stated that early in the month of May, 1915, that you saw

Dallas Hopper sinking these shafts and working on this land. Now prior to that time how much drilling had been done upon the land here in controversy, if any?

A. There were eight holes.

Q. Where were they located?

A. Three holes on the northwest forty, three holes on the southwest forty ——

Q. Prior to the first of May, 1915?

A. Yes, sir. And two holes on the southeast forty.

Q. When were those holes drilled on the southeast forty?

A. Those are the holes that were drilled the summer that I came to Church and Mabon and took the drills off the holes. They were drilled in the summer of 1914.

Q. At the time you were drilling that land hole number 127 you believed that that was on the forty above it but the actual survey shows it was drilled on this land, isn't that true?

A. I don't know where it is supposed to be drilled, I know it is on that forty and it is called the line hole.

Mr. Ewert: I think that is all.

Redirect Examination by Mr. Thompson.

Q. Mr. Plumb can you tell from any information you have how many holes were drilled upon the 120 acre tract prior to July 1, 1916?

Mr. Ewert: He said eight.

A. On the 120.

Q. Now with reference to July 1, 1916, how many holes were drilled under the Smith lease?

A. I couldn't say, there must have been close to fifteen.

Q. Can you from an examination of your log book determine that?

A. No, because I haven't the logs of the holes that were drilled by Mr. Dike.

Q. Outside of what was done by Mr. Dike can you?

A. Well that is the eight holes, possibly nine holes; there wasn't any drilling done except on the Quebec to my knowledge.

Mr. Thompson: That is all.

(Witness dismissed.)

J. E. POTTORFF, produced, sworn and examined as a witness for and on behalf of the defendant, testified as follows:

Direct Examination by Mr. Thompson.

Q. Your name is J. E. Pottorff? A. Yes, sir.
Q. You live in Miami? A. Yes, sir.
Q. What is your business, Mr. Pottorff? A. Mining.
Q. Were you ever interested in drilling upon the Fish land? A. Yes, sir.
Q. Under whom? A. Smith.
Q. How much drilling did you do?
A. Something like 1000 feet I guess, five holes.
Q. And what year? A. 1913.
Q. 1913? A. Yes, sir.
Q. Do you know about what time you commenced?
A. Some time about the first of June I think.
Q. Is that lease in writing?
A. No, sir, it was a verbal contract.
Q. You have been sued have you not by Mr. McCullough and his associates? A. Yes, sir.
Q. In Ottawa County District Court? A. Yes, sir.
Q. In which they claim that they were interested with you in that sublease?

Mr. Ewert: Object to that; move it be stricken out.

The Court: I don't see that is material; he is not a party to this suit.

Mr. Thompson: Here is the point, if the court please, the plaintiffs in this suit have sued Mr. Pottorff alleging that Pottorff secured for them a sublease from Smith and are prosecuting that suit today in the state courts.

The Court: There is no issue here on that. I think that is immaterial.

Mr. Thompson: I rather think we do plead it.

Mr. Davenport: But if it had been plead, your honor please, the record would be the only admissible record.

Mr. Thompson: I am not offering the record, I am merely offering this man.

The Court: You can't identify them until you get the record here.

Q. How long did it take you to drill that, Mr. *Plumb*?
A. Well I drilled until the first of September.

The Court: You can prove he drilled on this identical land.

Q. That is September, 1913? A. Yes, sir.
Q. At that time, Mr. Pottorff, do you know whether there had been any other prospecting upon the Fish land prior to that time? A. Yes, sir, there had been some.

Q. By whom?
A. Man by the name of Holton and his partner.
Q. How many years prior?
A. Well I couldn't just say.
Q. Holton was not under the plaintiffs was he?
A. No, sir.

Cross Examination by Mr. Davenport.

Q. Mr. Pottorff, what lands did you drill on, what part of the Fish land? A Southwest of the northeast.
Q. That is what is known as the Montreal forty isn't it?
A. No, sir, south of the Montreal forty.
Q. How many holes did you drill? A. Five.

The Court: Who do you say you drilled under?

A. I taken a verbal lease from Smith.

The Court: What sort of a contract?

A. I was to pay a royalty.

Mr. Ewert: Was that contract in writing?

A. No, sir.

The Court: How long was it to extend for?

A. Well the termination——

The Court: How long was it to last?

A. The verbal contract was to last until I struck ore, I was supposed to take a written contract.

Mr. Davenport: Your honor please, I move at this time to exclude all the testimony because under our statute the contract is void.

Mr. Thompson: We now offer in evidence, if the court please, defendant's Exhibits No. 32 to No. 44, inclusive, being certified copies of transfers made by Hopper to McCullough for various interests in this lease.

The Court: Are they subsequent or prior to the transfer from Hopper to McCullough?

Mr. Thompson: Well they are all about the same time, transfers by Hopper and transfers by McCullough. We are offering them for the purpose if the court please —I think practically all of them are made in March, April and May, 1915, and the strike upon this ground was made upon the 5th day of May, 1915—we are offering them for the purpose of showing they were practically being given away all over that country.

The Court: Wouldn't they have a right to speculate

if they had a lease and they kept it alive, if the lease provided for delay and they kept it up?

Mr. Thompson: I don't know that it has great probative force but we would like to have it put in the record. There is an express denial in the answer that the plaintiffs are the sole owners of this property.

The Court: That is the reason I asked if these transfers were subsequent.

Mr. Thompson: They are prior to the bringing of this lawsuit and Mr. McCullough on the witness stand testified he had made transfers prior to bringing the suit to Mr. Towne and Mr. Ewert.

Mr. Ewert: Now object, your honor, as to Defendant's Exhibit No. 32 because that is a certified copy of what we have already introduced therefore there is no use encumbering the record on that. That is the assignment from Dallas Hopper to J. P. McNaughton.

The Court: If that has already been introduced it will be excluded.

Mr. Thompson: I am not sure of that.

Mr. Ewert: I think I am in error as to that, your honor. We object to Exhibit No. 37 upon the ground it appears this assignment was made on the 24th day of November, 1916. I can't see how that would be material at all.

The Court: Who was that made by?

Mr. Ewert: Made by McCullough to Landrum.

The Court: Very well make your objection.

Mr. Ewert: And on the ground it is immaterial in this suit. Defendant's Exhibit No. 36 is objected to on the ground it is immaterial, shows a transfer of the property from McCullough to Frank Gains and is made April 14, 1917.

The Court: Take those and have your objections ready in the morning.

THALSD SHELTON, produced, sworn and examined as a witness for and on behalf of the defendants, testified as follows:

Direct Examination by Mr. Thompson.

Q. State your name. A. Thalsd Shelton.
Q. Where do you live, Mr. Shelton?
A. Carterville, Missouri.

Q. Are you mining in Ottawa County, Oklahoma?
A. Yes, sir.
Q. With what company?
A. With the Quebec Mining Company.
Q. Is that located on the Fish land? A. Yes, sir.
Q. On the northwest forty?
A. I don't know the description but the forty west of the Montreal.
Q. Are you producing ore there? A. Yes, sir.
Q. Mr. Shelton, what is your employment? A. Manager.
Q. You have active charge of the operations?
A. Yes, sir.
Q. Approximately what investment and what improvements have you put on that property?
A. Well we have put a three hundred ton mill.

Mr. Davenport: Pardon me, he represents and is in position to state who owns the property?

Mr. Thompson: Yes.

Mr. Davenport: I wanted to know if he knew the operators and if he represented that company.

The Court: Go ahead.

A. We have a three hundred ton mill.

Mr. Ewert: May the same objection that this Quebec improvement was made within the last year and we have the same objection?

The Court: Yes, go ahead.

A. We have a three hundred ton mill with two shafts and an investment that represents about $150,000.00.
Q. That is owned by a corporation is it?
A. Well now I don't know whether they are incorporated or not but I think so, it is known as the Quebec Mining Company.
Q. You are operating there now? A. Yes, sir.

Mr. Thompson: I believe that is all.

Cross Examination by Mr. Ewert.

Q. What is the sale value of the ore you have taken out of the ground? A. Up to date?
Q. Yes.
A. I think between 125 and $150,000.00, in that neighborhood.
Q. And what does the ground look like there, look as though you had a mine?
A. Well that is pretty hard to tell; it looks pretty good some times other times it don't.

The Court: When did you start that mill, what day?

A. I think last August.

The Court: 1918?

A. August, 1918, we started the mill in operation.

Q. Will you tell the court whether or not you had knowledge of this law suit?

The Court: Oh don't ask him that. Who did you go in there under?

A Well I don't know, I went to work for the Quebec Mining Company.

Q. You don't know where your title come from?

A. No, sir.

Q. How much royalty did you pay?

The Court: Oh that is immaterial.

Mr. Thompson: Do you know whether it is the property Mr. McClellan obtained from Plumb and Wilkins?

A. Yes, I knew that.

Mr. Thompson: Tnat is the Mr. Plumb that was just on the stand?

A. Yes, sir.

(Witness dismissed.)

Mr. Thompson: Your honor, that is practically all we have except the court clerk of Ottawa County and I 'phoned him last night to be here today and court is in session there and he and Mr. Mabon will be down on the midnight train.

The Court: Very well, court will adjourn until tomorrow morning at nine o'clock.

And thereupon court took a recess.

And thereafter court reconvened July 2, 1919, at ten o'clock A. M., pursuant to adjournment and the following proceedings were had:

Mr. Ewert: Now may it please the court I desire to object to the introduction in evidence of Defendant's Exhibits No. 32 to No. 44, inclusive, upon the ground that they are incompetent, irrelevant and immaterial.

The Court: You have already got that in.

Mr. Ewert: Yes. That they are not admissible under the pleadings, the pleadings not expressly denying that the plaintiffs are the owners and holders of the lease made to Hopper: their only averments being that they

have no knowledge as to the truth of such allegations. Under the rules of equity unless they are expressly denied they are admitted. The only averment being defendant avers that the plaintiffs are not the sole owners of said lease at the present time.

The Court: Do they allege that in their answer?

Mr. Ewert: That is all they allege.

The Court: You may go ahead, I will pass on it later.

The Court: Yes. that is the objection. In addition at this time in view of the fact that these certified copies are of the date November, 1917, and no later we will have to ask leave of the court in rebuttal thereof to bring in certified copies of the record showing that our plaintiffs are the owners of the title here in question. In other words they pick certain certified copies but they haven't brought the whole record here. We will ask to get certified copies from the register of deeds.

The Court: Very well, you will be permitted to do that.

Mr. Thompson: These are offered, your honor please, and may be admitted under your general order.

The Court: Yes, subject to these objections and I will pass on them later. They are admitted subject to these objections and the general order to be passed on later.

And thereupon defendant asks leave to file an amendment to his answer and the court announced he would rule on it later.

Mr. Thompson: Now if the court please through this witness we want to offer our amendment.

The Court: The amendment is considered offered and I take that under advisement. I want to consider the evidence in connection with it.

CARL M. SWEEM, produced, sworn and examined as a witness for and on behalf of the defendant, testified as follows:

Direct Examination by Mr. Thompson.

Q. Your name is what, please? A. Carl M. Sweem.
Q. Where do you live, Mr. Sweem?
A. Miami, Oklahoma.
Q. How long have you lived there? A. Twenty years.
Q. What if any official position do you now hold?
A. Court clerk of Ottawa County, Oklahoma.

Q. How long have you occupied that position?

A. Since the first of January, 1917.

Q. As such officer do you have custody of all the court files, cases filed in that court in the District Court?

A. I have.

Q. I ask you to examine your file jacket case No. 1586 and state whether or not that contains the official files in that case.

A. It does.

Q. Those are files in a case filed in your office in Ottawa County, Oklahoma? A. They are.

The Court: Did this ever go to final judgment?

Mr. Thompson: It is pending in the Supreme Court now. Your honor will observe in that suit the plaintiffs were suing the defendant here and claim an interest under our lease on the entire 200 acre tract. It is signed by the plaintiff here.

The Court: Now what is the date of the lease of the McCullough lease involved in this?

Mr. Ewert: April, 1912, the Hopper lease. McCullough did not acquire any interest until 1915 after the so-called mining was done under that lease. Of course he had a right to pursue his remedy.

Mr. Thompson: Your honor will observe the filing was September 29, 1916.

The Court: When was this suit filed?

Mr. Thompson: July 1, 1916, suit was filed in this court.

The Court: This man McCullough claims an interest under the Smith lease. When was the transfer?

Mr. Ewert: In 1913. This man Pottorff——

The Court: I don't care anything about that.

Mr. Ewert: Well I want to get the dates.

The Court: When did McCullough get this lease from Hopper?

Mr. Ewert: 1915.

The Court: What time?

Mr. Ewert: I think in April.

The Court: I don't think this is material.

Mr. Thompson: If your honor please, McCullough acquired his interest from Hopper in the spring of 1915.

The Court: Well he could have both. First I thought the original parties to the lease in April, 1915, was a party to this other. That would be inconsistent.

Mr. Thompson: If the court please, McCullough and Landrum are in this court suing to cancel the lease which they are claiming an interest under in that suit right there.

The Court: That wouldn't make any difference, they might have that and yet show a superior title to it.

Mr. Thompson: They are asking now in the District Court of Ottawa County for judgment. They may obtain judgment against Smith. Here they are praying to cancel.

Mr. Currey: I think if you will let me read an allegation in that petition your honor will see. The first is the allegation of the lease being made to Smith on the 4th of November, 1912. Then there is an allegation of a lease being obtained by Smith on the 6th of January, 1913, from Leander J. Fish and Joseph P. Fish, and that is set out in full. Those are the exact leases that they are pleading here now. Then there is the allegation: "That after executing said lease it became necessary to prospect the lands, and in order to get the prospecting done the defendant J. E. Potterf with the knowledge and *acquiessance* of the defendant Smith represented to the plaintiffs and their associates that he held valid sub-leases from the defendant Smith upon the property at a ten per cent royalty and requested the plaintiffs and other associates with them to join with him in developing the land and doing the work required of defendant Smith to hold the original lease——"

The Court: That covers 200 acres of land?

Mr. Currey: Yes. "——and the work required of him to hold his subleases and stated to them that if this was done their interest in this should be in proportion to the amount advanced. That pursuant to said agreement T. L. Robinson, W. P. McCullough, Byron White, E. M. Landrum, Oscar Hadley and E. Stuckey advanced and paid for eight-sixteenths of the amount required to drill four holes on the property. Robinson, paying for 2/16 McCullough 1/16 and Stuckey 1/16 and Byron White and E. M. Landrum 2/16 and Oscar Hadley and W. P. McCullough 2/16, and all interests of White being purchased by E. M. Landrum and all interest of Hadley being assigned to W. P. McCullough. That the interests now held by the parties are as follows:"

The Court: Where did Pottorf swear those four holes were drilled on that eighty acres of land not included in this case?

Mr. Ewert: He swore that they were drilled on the south forty not involved in this case.

Mr. Currey: (Continuing reading) "T. L. Robison 2/16 W. P. McCullough 3/16, E. M. Landrum 2/16, E. Stuckey 1/16, and the remaining interests were held by the defendant Potterf and his associates. That the management of the drilling was intrusted to defendant Potterf. That said Potterf as a result of the drilling discovered that the land contained valuable deposits of lead and zinc, and after making the discovery he kept the discovery secret from plaintiffs, but informed defendant Smith of the situation. That all the work required to keep alive the lease of defendant Smith from the original landlord was done by plaintiffs and the parties interested and defendant Potterf who with the knowledge and acquiescence of defendant Smith did the drilling under representations made to the plaintiff, of being the owner of the sublease from Smith and collected the price of the drilling from plaintiffs in the proportion stated. That after discovering ore in paying quantities existed on the land the defendant Potterf in violation of his duty to the plaintiff, colluded with defendant Smith and the defendant Smith in violation of the rights of the plaintiff, granted a lease on the property to the defendant J. S. Mabon and L. C. Church at a 15% royalty, which said lease is as follows:" And then sets out that lease. Then after setting out that lease they charge: "That at the time of the making of said lease ore had been discovered upon the land, as a result of the means of the plaintiffs, but no notice was ever given the plaintiffs requiring further development prior to the making of said lease. And the plaintiffs were not advised that further development was required and that defendant Potterf with the knowledge of defendant Smith assured plaintiffs that it was not necessary to do further development in order to hold their interests. That under said last named lease further development has been had and the defendants Church and Mabon have paid to defendants Smith and Potterf a large amount of equity. That in equity and good conscience a 1/3 of the royalty paid and to be paid by the defendants Church and Mabon belongs to the plaintiffs, namely: W. P. McCullough 3/16, T. L. Robinson 2/16, E. M. Landrum 2/16 and E. Stuckey 1/16. That the defendants Potterf and Smith are now receiving said 5% advance royalty. The plaintiffs ask that the defendants Smith and Potterf, be required to account with them for the 1/2 of the 5% extra royalty that has heretofore been received, the exact amount of which

is unknown to the plaintiff. They further ask that all of the defendants be required to account with the plaintiffs for 1/2 of the 5% extra royalty demandable under the lease, from and after the beginning of the suit for the defendants Mabon and Church, and for a judgment for their costs and for all other relief in equity and good conscience they may be entitled." Now that covers the 200 acres of land.

The Court: It is my recollection, Mr. Pottorff, the drilling he testified about on land under the Smith lease but not under the 120 acres of the Hopper lease.

Mr. Currey: How would that make any difference when the contention here is that they were at that time claiming the 120 and in addition to that the other eighty acres making the 200 acres?

The Court: The way I understand the record at that time McCullough had not acquired the Hopper lease.

Mr. Currey: Oh he had.

The Court: I am talking about the time the development was done, that was in 1913.

Mr. Currey: They say it was prior to this lease.

The Court: I will not permit this amendment.

Mr. Currey: It isn't a question of when they make the record; it is a question of when they make the claim. They made this claim in 1916; that their contract was still in force and would remain in force during the life of the 200 acre lease held by Smith.

The Court: I think I understand this case. McCullough may have acquired both leases and that is just a question of an attorney as to the election of remedies. I will not permit it.

Mr. Currey: Then if the court please I will ask to identify the paper handed the stenographer. We offer to file as an amendment to the defendant's answer the paper marked Defendant's Exhibit No. 45.

The Court: The evidence shows that the development made by Pottorff was made in 1913, and the basis under the allegations of this offered amendment would grow out of that development, and at that time it is not claimed that McCullough then claimed any interest by virtue of the Hopper lease. The amendment is refused for that purpose. Further on the ground that it comes late at this time.

Mr. Currey: Now will you let me put this statement

into the record that without offering to file Defendant's Exhibit No. 45 as an amendment the defendants make profert to the court of the petition referred to?

The Court: You make a copy of that petition and attach it to that amendment if you desire. You can take time and make your record in better shape.

Q. Mr. Sweem, I wish you would examine Defendant's Exhibit No. 1 and state whether or not that is a part of the file you have been inquired about? A. It is.

Q. And does it contain the filing mark on the back?

A. Yes, sir.

Q. And that is the date it was filed in your office?

A. Yes, sir.

Q. Mr. Sweem I wish you would examine this paper and state whether or not it is a part of this same file. A. It is.

The Court: Of course when you brief this case you may brief that point and if I determine I am wrong I will reopen this case and let you furnish that testimony.

Mr. Ewert: Of course we would want permission to bring evidence.

Q. Is this paper which I hand you part of the files in the same case? A. It is.

Mr. Thompson: We ask the stenographer to mark the same as Defendant's Exhibit No. 47. We now offer in evidence Defendant's Exhibits No. 46 and No. 47.

The Court: Very well, they all are excluded for the same reason but they will go in the record so as to make up the record.

Mr. Thompson: Now with reference to these files, may we submit copies to the stenographer and withdraw the originals?

The Court: Yes.

Mr. Thompson: If the court please we would like to offer this petition for another reason, as contradicting the plaintiffs as to who developed that property.

The Court: Now let me see who signed it.

Mr. Thompson: McCullough. That petition was shown to Mr. McCullough when he was on the stand and he identified it as being his signature.

The Court: Very well.

Mr. Ewert: Objected to on the ground it is incompetent and immaterial, the petition.

The Court: They offer it now for the purpose of impeaching McCullough.

Mr. Thompson: We offer it for the purpose of impeaching the plaintiffs.

The Court: McCullough.

Mr. Thompson: McCullough and Landrum.

The Court: Landrum is not a party to this suit. The only man that signed it is McCullough.

Mr. Thompson: We also offer in connection with this the judgment of the court against Landrum and McCullough.

The Court: I will admit it for the purpose of impeaching McCullough.

Mr. Ewert: Objected to as incompetent, irrelevant and immaterial, not in the nature of an impeachment and no foundation laid.

The Court: Of course I realize a pleading is not much of an impeachment of a client, because ninety-nine times out of a hundred he will sign and swear to whatever his lawyer fixes and prepares.

Mr. Thompson: We may have the same privilege to submit copies for this present instrument and withdraw it?

The Court: Yes.

Mr. Ewert: Mr. Pottorff swore positively at the injunction that the lease in question was only a lease on the forty acre tract lying south of the Montreal.

The Court: If you have the evidence let them admit that without bringing him back.

Mr. Ewert: They have a copy and we have a copy.

Mr. Thompson: Of what Mr. Ewert?

Mr. Ewert: I want you to admit that at the hearing on the injunction in November, 1916, that Potterff testified——

The Court: If they will admit that he would swear in this case what he swore in the other.

Mr. Thompson: If counsel will tell what his theory is I think we might agree on it.

Mr. Ewert: Potterff swore clearly in the hearing under oath——

The Court: No, just that part of the evidence that he testified to that you want him to tell. Get it and show it to them.

———

AGREEMENT.

Both parties admit that the forty acres of land developed by Pottorff was a part of the Fish tract and was not a part of the 120 acres covered by the Hopper lease, but was a part of the 200 acres covered by the Smith lease, in other words it was a part of the eighty acres that was not included in the 120 acres in the Hopper lease.

Mr. Thompson: But the defendant does not admit that there was one of the holes drilled by Pottorff on the forty immediately east thereof. We do admit, if the court please, that Pottorff only had a claim upon the forty but there was one of the holes over on the forty east of that, we don't want to admit he had no interest in that forty.

Mr. Ewert: I think that will cover it so we won't have to recall Mr. Pottorff.

The Court: Now was that forty acres the Quebec forty?

Mr. Ewert: It is the forty south of the Montreal forty, the Quebec forty is on the 120.

The Court: The Pottorff forty was south of the Montreal forty?

Mr. Ewert: Yes, and not in this suit.

The Court: Is there any development on that Pottorff forty now?

Mr. Ewert: No mills on there, no

Mr. Thompson: No, sir. It is admitted subject to Mr. Ewert's objections that the following is a part of the testimony given by W. P. McCullough in the case referred to by the witness as being No. 1586 in the District Court of Ottawa County, Oklahoma, under the petition which has been duly offered in evidence herein, and the testimony is as follows:

"Q. Is that your signature there to the petition? A. Yes, sir.

Q. Was it sworn to? A. I think so.

Q. Didn't you swear in there that he is? A. I don't remember.

Q. Did you read it over? A. Yes, sir, I did.

Q. Don't you know in truth you swore that Mr. Pottorff was taking and has been since developments were made on the Fish land royalties off of said land? A. I am frank to say I believe it.

Q. What do you know about it now? A. I can't say positively that he is or is not.

Q. But you are willing to verify this petition? A. I have been doing it.

Q. If you recover in this lawsuit you are seeking to recover what? A. Just exactly what is due me.

Q. What is it? A. My interest in five per cent of the royalties on that land.

Q. On the 200 acres? A. 200 acres.

Q. Based upon the Smith lease? A. Yes, sir.

Q. Is it not a fact you have a suit now pending in the Circuit Court of Appeals brought by you against Mr. Smith seeking to cancel the Smith lease? A. Absolutely.

Q. And establish that you had the first prior lease? A. I think I have.

Q. You are willing to urge this suit to acquire judgment against Mr. Smith for the royalty to accrue and yet you are seeking to set aside the lease in another suit? A. I am frank to say I want what is due me.

Q. Is that your idea of right and wrong? A. Yes, I have put my money into this proposition."

Mr. Ewert: Objected to upon the ground it is incompetent, irrelevant and immaterial and not admissible under the rulings of this court denying the plaintiffs' application to amend the bill; and, second, not admissible under the pleadings, to-wit, the answer of the defendant in this suit.

Mr. Thompson: You are not objecting that the testimony hasn't been properly identified?

Mr. Ewert: No.

The Court: That is offered on the ground of impeachment.

Mr. Ewert: Yes, sir.

The Court: He is a party to the suit.

(Witness dismissed.)

RAY McNAUGHTON, produced, sworn and examined as a witness for and on behalf of the defendants, testified as follows:

Direct Examination by Mr. Thompson.

Q. Your name is what? A. Ray McNaughton.

Q. Where do you live? A. Miami.

Q. What is your business? A. Attorney at law.

Q. Have you held any official position in Ottawa County?

A. I do not at this time.

Q. Have you? A. Yes, sir.

Q. What? A. County attorney.

Q. Mr. McNaughton were you ever interested in the Hopper lease on the Fish land?

A. Yes, in one Hopper lease on the Joe Fish land.

Q. Well that is the allotment of Leander J. Fish?

A. As I understand it yes, sir.

Q. I hand you Defendant's Exhibit No. 32, which appears to be a certified copy of assignment to you and Mr. J. P. McNaughton. I wish you would examine it and state whether or not you are the Ray McNaughton mentioned therein.

A. I am the Ray McNaughton mentioned in that assignment.

Q. You notice that that is dated the 11th day of March, 1915. At that time were you county attorney? A. I was.

Q. And who conducted negotiations which culminated in the execution of this assignment?

A. There were no negotiations to speak of. Mr. Hopper and myself had the conversation and as I recall it drew the assignment; no one else present.

Q. What consideration was paid for that two-thirds interest that you and Mr. McNaughton acquired?

Mr. Ewert: Objected to as incompetent, irrelevant and immaterial.

The Court: I don't see the materiality.

Mr. Thompson: We are pleading an abandonment and we offer to show by this witness that as late as March, 1915, the legal owner of the Hopper lease gave away two-thirds interest therein and made statements concerning it. This is an assignment of two-thirds interest in that Hopper lease. Just bartered around any way.

The Court: Well I don't know of any rule in this country that a man can't give away anything if he is competent. You proved this man is county attorney; he was capable of defending and developing it I presume; surely a county attorney wouldn't draw a lease for anything he didn't consider of any value. I don't think the consideration is material in this case.

Mr. Thompson: If your honor will examine the answer we are pleading an abandonment and that their operations have not been in good faith and they have gone from one place to another on the ground.

The Court: I will sustain the objection.

Mr. Thompson: Defendants offer to prove by this witness that the assignment made by Dallas Hopper to-

J. P. McNaughton and Ray McNaughton on the 11th day of March, 1915, known as Defendant's Exhibit No. 32 herein, was executed and delivered to this witness assigning a two-thirds interest in the Hopper lease without any consideration whatever, and that no consideration was passed by the assignees to Hopper for this assignment, and that Hopper at the time of the execution thereof stated that he was not able to do anything with the property. That is our offer if the court please and that is refused.

The Court: Yes.

Mr. Thompson: And we may have an exception. That is all.

Mr. Ewert: That is all, Mr. McNaughton.

(Witness dismissed.)

Mr. Thompson: That is our case.

REBUTTAL TESTIMONY.

J. C. WILLUM, produced, sworn and examined as a witness for and on behalf of the plaintiffs in rebuttal, testified as follows:

Direct Examination by Mr. Ewert.

Q. State your full name, Mr. Willum. A. J. C. Willum.
Q. Where do you live? A. Miami, Oklahoma.
Q. How long have you resided there? A. Since 1906.
Q. Were you acquainted with Leander J. Fish in his life time? A. Yes, sir.
Q. Are you acquainted with the plaintiff in this suit, Mr. McCullough? A. Yes, sir.
Q. And with Dallas Hopper? A. Yes, sir.
Q. Do you recall the occasion in 1912 when Mr. Fish executed a certain lease to Dallas Hopper and I show you that lease Plaintiffs' Exhibit No. 1? A. That is my signature.
Q. Is that your signature attached to the bottom of Plaintiffs' Exhibit No. 1 as a witness?

Mr. Thompson: Hasn't this all been gone over? This witness was on the stand.

Mr. Ewert: No he hasn't been on the stand.

Mr. Thompson: I think he testified to all that. Weren't you on the stand?

A. I was on the stand in the next trial before this.

The Court: Yes, I don't believe he was a witness.

Mr. Thompson: Didn't you testify here in May, Mr. Willum?

The Court: Of course if this is a duplication I will strike it out. When we adjourn these hearings that makes it hard on me.

Mr. Ewert: I will try not to duplicate anything in any event.

Q. At the time this lease, Plaintiffs' Exhibit No. 1, was executed were you present in the office of Mr. Ballard?

A. Yes, sir.

Q. Did you hear the testimony of Joe Fish yesterday?

A. Yes, sir.

Q. To the effect that he was present when this lease was executed? A. Yes, sir.

Q. Was Joe Fish present when the lease was executed?

A. If he was I didn't see him.

Q. How long were you there?

A. I was there until the lease was drawn and I signed it as a witness.

Q. Had you met Mr. Fish prior to the time this lease was executed? A. Yes, sir.

Q. On the same day? A. Yes, sir.

Q. Did you have a conversation with him?

A. No, sir, I didn't with him, I did with Mr. Hopper.

Mr. Thompson: This witness testified before he was in the pool hall and went with Hopper.

Mr. Ewert: It is barely possible we have gone over that but the point I want to bring him on for was to show whether Joe Fish was present.

Q. You say you didn't see Joe Fish there at that time?

A. No, sir.

The Court: Well if he had been there would you have seen him?

A. Certainly, couldn't help but see him.

Cross Examination by Mr. Currey.

Q. How long was it after this transaction before any occasion come for you to reflect on what took place at the transaction?

A. Well it was in 1918 I think when I was first notified that I was to be here as a witness in this case.

Q. Now from the time this transaction took place up to 1918 then you hadn't had your attention called to the question

of whether or not Joe Fish was present, I mean by anybody asking you? A. No, sir.

Q. How is that? A. No, sir.

Q. Had you had any occasion to think of the transaction?

A. Well I think I made an affidavit once in regard to this case.

Q. For whom? A. I think it was for Mr. McCullough.

Q. Relating to the matter of the execution of the lease in the presence of Joe Fish?

A. Yes, sir, in regard to this lease.

Q. Now that was in the fall of 1917 wasn't it?

A. I think so.

Q. That was made at a time when there was some hearing before the District Court wasn't it?

A. No, it wasn't before this court.

Q. In that affidavit, do you now recall whether or not in that affidavit you stated Joe Fish wasn't present?

A. I don't remember that, it has been a year or two back.

Q. As far as you know at the time you made that affidavit your attention wasn't called to the question of whether or not Joe Fish was present?

A. I don't know whether my special attention was called to that or not.

Q. Now did you go from the pool hall to Mr. Ballard's office at the time this acknowledgment was taken?

A. No, sir.

Q. You was sitting in Mr. Ballard's office?

A. No, sir, I was at the corner of the Ottawa County National Bank it is now, Mr. Hopper and Mr. Fish came along and asked me to go with them.

Q. Now you wasn't then in the office at the time Fish and Ballard came in to have this acknowledgment?

A. Yes, sir, I went in with them.

Q. I mean you wasn't there when they came in but you went in with them? A. No, sir, I went in with them.

Q. Did you hear the testimony of Mr. Ballard yesterday or day before yesterday? A. Yes, sir.

Q. Did you hear him make the statement that his recollection was that you were sitting in the office when these people came in? A. Yes, sir.

Q. Do you think he would be more likely to be mistaken than you would? A. I couldn't say.

The Court: That is a matter for other people to determine. I would say this if I went into a controversy of whether I was in a house when a thing was done, you said I was not there when it was done, if I went in there that I would have better reason to know about it. One is positive and the other is negative.

Mr. Currey: Yes, sir, but in this case the one is as positive as the other and that rule would apply if there had been testimony that he was not present. But Mr. Ballard testifies that he was present and the affirmative fact that he was sitting in the office.

Q. Now, Mr. Willum, do you recall anything that took place at that time out of the ordinary in transactions of that kind where you are simply called in to witness a lease?

A. Well when they went in to make the instrument there wasn't enough witnesses present. I sat there while Mr. Hopper went out and got another witness.

Q. And who did he bring in? A. Mr. M. Duffy.

Q. You remember that very distinctly? A. Yes, sir.

Q. Who said they needed any witnesses?

A. Well Mr. Ballard was the notary that acknowledged the lease and he said they had to have two witnesses and then we started out to get them.

Q. Did Mr. Hopper ask you to go down and witness the lease when you met them there at the bank?

A. Yes, sir, said he was going to draw a lease down there and asked if I would witness it and I stated I would.

Q. Who was that? A. Hopper.

Q. Did Fish say anything?

A. No, sir. not as I recollect of, he might have said something.

Mr. Currey: That is all.

Redirect Examination by Mr. Ewert.

Q. Did Fish at this same time try to get you to take this same lease?

Mr. Currey: Just a minute, we object irrelevant to any issue in the case.

The Court: What is the purpose?

Mr. Ewert: Just for the purpose of showing that this instrument was called to his mind in that way. That at the same time Fish wanted him to take an interest in this lease.

The Court: Well if prior to that time Fish had been talking to him about leases I will let you show that to show why a man would recollect the transaction.

Mr. Ewert: You may answer.

A. Yes, sir.

The Court: How long before?

A. About two days I think before this lease was executed.

The Court: I won't let him go into details.

Mr. Currey: Well we object to the question as calling for testimony that is irrelevant, incompetent for any purpose whatever.

The Court: I will let him show Fish had been talking to him along about that time for the purpose of showing why he would remember the transaction.

Mr. Currey: It would force the defendant to cross examine him as to what was said to test out his memory, so in that way we will get testimony in the record that is entirely incompetent.

The Court: For instance a man will say I notified him by telegram; he can't tell what is in it. The other side can say, what is in that telegram?

Mr. Currey: Well it is up to the court. It is irrelevant.

Mr. Ewert: Then I desire to ask the further question in the nature of impeachment of Joe Fish.

Mr. Currey: He didn't answer the question.

Mr. Ewert: I desire to ask this question in the nature of impeachment of the testimony of Joseph Fish with respect to an offer which he claims his father made to Hopper to the effect that he was to pay $65.00 and sign a note for three hundred dollars.

Mr. Currey: We object to that because there is no foundation laid for impeaching the testimony of Mr. Fish.

The Court: What are you going to ask him?

Mr. Ewert: I want to ask him whether or not in that conversation Mr. Fish in offering you this lease whether or not he asked you any bonus of any kind.

Mr. Currey: I object to that as leading and suggestive.

The Court: Sustained.

Cross Examination by Mr. Curren.

Q. How long have you known Joe Fish?

A. I expect twelve or fourteen years.

Q. Who was present when Fish offered you the lease on this ground?

A. Well there was Mr. Hopper and myself, talked it over on the counter in Mr. Dardeen's pool hall.

Q. Was Mr. Wagoner there? A. No, sir.

Q. Was you there at the time Mr. Wagoner and Hopper and Fish had a talk about a team? A. No, sir.

Q. You didn't hear any of that conversation? A. No, sir.

Q. It was in a pool hall about how long before you witnessed this lease?

A. I couldn't exactly state the time but my recollection it was about two days. It was some time before.

Q. Now there isn't an incident that you can mention that would give you any better reason for saying two days or two weeks? A. Of course I can't mention any incident.

Q. You say you met Fish at that time in the pool hall, how come you to meet him? A. Well they congregated there.

Q. And whose pool hall was it? A. Mr. Dardeen's.

Q. And you had been in the habit for months of congregating in that pool hall, you had been in the habit of going to that pool hall for practically two months?

A. Longer than that.

Q. Then some time when you was in that pool hall Fish talked to you about giving you a lease didn't he?

A. Yes, sir.

Q. And you don't know when it was?

A. It was during this period.

Q. Do you tell this court on your oath you have any better reason for thinking it was two days than two weeks?

A. Yes, sir.

Q. Now what is it?

A. For the simple reason this transaction was consummated within a week.

Q. Then it was within a week? A. Something like that.

Q. What time of day was it?

A. My recollection it was in the forenoon.

Q. Was you in a game of pool? A. No, sir.

Q. Just sitting in there? A. Yes, sir.

Q. Any game of pool going on?

A. There might have been, I can't recollect.

Mr. Currey: That is all.

Mr. Ewert: That is all.

(Witness dismissed.)

A. C. JONES, produced, sworn and examined as a witness for and on behalf of the plaintiffs in rebuttal, testified as follows:

Direct Examination by Mr. Ewert.

Mr. Currey: May I ask this witness a question: Didn't you testify in this case in May or April?

A. Yes, sir.

The Court: Yes he testified. It may be in rebuttal.

Mr. Ewert: It is in rebuttal of the testimony of Joe Fish.

Q. You heard the testimony of Joe Fish yesterday?

A. No, sir.

Q. You didn't hear it? A. No, sir.

Q. You testified in this case before at the time of the trial? A. Yes, sir.

Q. You know what the subject matter is with respect to this Hopper lease. Do you remember when that Hopper lease was executed? A. Yes, sir, I know when it was executed.

Q. Do you remember whether or not on the day it was executed you saw Joe Fish? A. Yes, sir.

Q. Where did you see him? A. In the pool hall.

Q. What were you doing?

A. I was in there and Mr. Hopper asked me to stay in there while they made out a lease.

Q. State whether or not you heard a conversation with respect to the giving of this lease between Mr. Hopper and Leander J. Fish? A. Yes, sir.

Mr. Currey: Wait a minute, between whom?

Q. Was Joe Fish present then?

Mr. Currey: Wait a minute, between whom was this conversation?

The Court: Who was the conversation between?

A. Mr. Hopper and Mr. Fish.

The Court: Who was present when that took place?

A. I was the only man that was up there by the show-case and he asked me to stay there while they made out this lease.

The Court: Was Joe Fish there?

A. Yes, sir.

Mr. Currey: We object to the question because it is not in rebuttal and because it is a part of his original case.

The Court: He may answer.

Q. After they had this talk about the lease you say Hopper asked you to stay there? A. Yes, sir.

Q. Did Joe Fish remain in the pool hall or not?

A. Yes, sir.

Mr. Currey: Wait a minute. I object as leading and suggestive.

Q. Did he remain there continuously?

Mr. Currey: I object as leading and suggestive.

Q. How long did he remain?

Mr. Currey: I object.

The Court: Now you testify that they were in the pool room; Joe Fish was there. Who went out first?

A. Mr. Hopper and Mr Fish went out

The Court: When did Joe Fish go out?

A. He never went out until Mr. Fish came back from Mr. Ballard's.

Q. How long did he remain there that morning——

Mr. Ewert: Strike that out please.

Q. About what time in the morning was this when the conversation took place, the time of day?

A. Oh somewhere around nine or ten o'clock, something like that.

Q. And Fish and Hopper went out and how long was it before Leander J. Fish returned?

A. Seemed to me it was about an hour.

Q. And was Joe present?

Mr. Currey: We suggest that is leading.

The Court: Yes.

Q. How long was Joe in there?

The Court: I think he has testified about that.

Cross Examination by Mr. Currey.

Q. What is your name? A. A. C. Jones.

Q. And what do you do?

A. Baggage man for the Frisco Railroad.

Q. How long have you been in that business?

A. Eighteen months.

Q. What did you do in 1912? A. Working in the mines.

Q. What were you doing in the pool hall this morning?

A. Working at nights and that was where I loafed around in day time.

Q. Had you worked that night? A. I don't recollect.

Q. Do you know whether you had worked within forty-eight hours? A. Yes, sir.

Q. You worked the day before?

A. No, sir, I worked at nights.

Q. You don't know whether you worked that night or not?

A. I think I did.

Q. What time of night did you quit? A. Twelve o'clock.

Q. And what time did you go to bed?

A. As quick as I got home.

Q. What time did you get up that morning?

A. I always get up at six o'clock.

Q. What mine was you working in?
A. I was working at the McConnell.
Q. That was in April, 1912, you was working at the McConnell mine in 1912 were you, which McConnell mine was it?
A. I worked for them out at Tar Creek and down in the bottom by Miami.
Q. That one down in the bottom?

The Court: Where did you say you were working?

A. I was just trying to place——
Q. Don't you know?

The Court: What did you start to say?

A. Why I don't know whether I was working at the McConnell mine at that time or not, but I had been working there.
Q. Don't you know at that time McConnell wasn't mining in that district and didn't mine in that district for two years after that, don't you know that as a fact?
A. No, I don't.
Q. The second mine you speak of wasn't opened until 1916 was it so that anybody worked there?
A. I couldn't just say what dates.
Q. You don't know where you was working do you? Do you? A. Just wait a minute I will see.
Q. Isn't it a fact you was running that pool hall part of the time? A. No, sir, it was not.
Q. You never did run that pool hall?
A. No, sir, only just a time or two when Hopper went out.
Q. Now when was your attention called to this question of whether Fish was there and who called your attention to it?
A. I don't know, I was asked about that I believe during that other——
Q. Who asked you about it?
A. I believe it was Mr. Cullough.
Q. You and Mr. McCullough talked it over? A. No, sir.
Q. That was during this trial? A. No, sir.
Q. Some other trial in May, and who suggested Joe Fish was there? A. He asked me if Joe Fish was present there.
Q. And you told him he was? A. Yes, sir.
Q. Now you are reasonably certain in was about nine o'clock when Fish and Hopper left that building?
A. About that time.
Q. And they was gone about an hour?
A. Leander J. Fish and Hopper.
Q. Did they come back up there?
A. No, sir, Fish came back but Hopper didn't come until after Fish come and left.
Q. How long did you stay in the pool hall?

A. About an hour and a half.

Q. While you was there you didn't see Leander J. Fish and Hopper come back?

A. I saw them both come back but they came back separately.

Q. Did you see either of them in conversation with Wagoner? A. No, sir.

Q. Did you see Mr. Wagoner around there? A. No, sir.

Q. All you know is Joe Fish didn't follow out with his father? A. I know he didn't go out with his father.

Q. You were in the habit of seeing Joe and his father together? A. Yes, sir.

Q. Did you ask Joe why he didn't go with his father?

A. No, sir.

Q. Practically every place Leander Fish went Joe Fish went, isn't that a fact?

Mr. Ewert: Objected to, your honor, as improper cross examination.

The Court: I think he can ask that.

A. Why I see him with him most all the time when they were in town.

Q. You scarcely ever saw Leander Fish around town without Joe Fish? A. Quite frequently.

Q. You didn't ask why he didn't go out with his father?

A. No, sir.

Q. And Joe was there when his father left? A. Yes, sir.

Q. Joe wasn't engaged with anybody in a game?

A. He was shooting the pool balls by himself.

Q. At the time they went out Joe was there with his father? A. Yes, sir.

Q. And the father went out and Joe turned around and went to shooting the pool balls on the table? A. Yes, sir.

Mr. Currey: That is all.

The Court: In that conversation up there was anything said about a team?

A. No, sir.

Q. Did you hear the conversation between Leander Fish and Hopper all of it? A. No, sir.

Q. Didn't hear any conversation?

A. Just said they were going to make a lease and asked me to stay while they made it out.

Q. And that is all that was said between them?

A. That is all I heard, yes, sir.

(Witness dismissed)

Mr. Ewert: I would like to direct the attention of the court at this time to the fact that this lease was recorded at ten o'clock A. M. on that date.

DALLAS HOPPER, called as a witness in rebuttal on behalf of the plaintiffs, testified as follows:

Mr. Ewert: Now may it please the court without laying myself liable to cross examining the witness concerning a matter which plaintiff himself has raised, the question of its competency, and reserving that right under your ruling, I wish to ask this witness a question concerning an exhibit that was attempted to be introduced by the defendants.

The Court: What is the exhibit?

Mr. Ewert: Defendant's Exhibit #41, which is an assignment of an interest in a mining lease made by Dallas Hopper to one Williams, assigning a thirty-sixth interest to Williams under date of the 17th of May. I objected to the introduction of these exhibits.

The Court: Very well, let it go in and I will pass on that later. You by cross examining him don't waive any right you have.

Q. I notice that Defendant's Exhibit #41 is an assignment from Hopper to Curt Williams——

Mr. Currey: We object to any statements for the reason that the assignment itself is the best evidence of what took place.

The Court: Let's find out what his question is first.

Q. Well, will you tell the court whether or not—what the consideration for that assignment was in addition to the dollar stated?

Mr. Currey: We object to the question for the reason——

The Court: Yes, I think that is immaterial.

Mr. Ewert: I want to show by this witness that at this time——

The Court: What is that date?

Mr. Ewert: On May 17, 1915. That this assignment was made on condition that Curt Williams, the grantee, furnish certain money with which to develop a sublease which Mr. Hopper had on this land which he had taken back from Mr. McCullough and that this lease was ex-

ecuted and they started work under this sublease on the twenty acres and Mr. Williams never put in any money and therefore this assignment of itself was without consideration.

Mr. Currey: We object to that for the reason it is not competent.

The Court: I don't think so; I don't think that is competent. I will sustain the objection to that.

Mr. Ewert: Exception please. This is material, your honor, in this respect, that in these exhibits #32 to #44 certain assignments have been made by Hopper and those assignments call for the entire interest of Hopper in the lease; and we want to show that as to this particular assignment that while it is of record in the fashion that they say it is by this certified copy, that the consideration for it was that Williams should furnish certain money to develop a lease on this tract of ground.

The Court: That carries the title all right. Your remedy was to get an assignment back. You are in here with a suit in equity. Williams isn't a party to this suit. I will sustain the objection.

Mr. Ewert: Kindly allow us an exception.

The Court: Now did he assign it all away before he assigned to McCullough?

Mr. Ewert: Oh, no. In order to make our record.

Q. Did you hear the testimony of Joe Fish in this case?

A. Yes, sir.

Q. Did you hear his testimony wherein he stated that he was present at the time the lease was executed? A. Yes, sir.

Q. Was he present or not?

Mr. Currey: We object to Mr. Hopper testifying.

The Court: I will permit him to testify that Joe Fish was not present. I will not permit him to testify anything that was said.

Mr. Currey: Let us object because it is testimony concerning a transaction with a dead man.

The Court: The testimony is concerning where Joe Fish was.

Mr. Currey: This is the plaintiff's assignor.

The Court: I will permit him to testify. Fix the date.

Q. Was Joe Fish present on the 29th day of April, 1912, when Plaintiff's Exhibit #1 was executed?

The Court: No, I won't let you testify to that. I will let you prove by him any time whether or not Joe Fish was about his office on that day at any time.

Q. Did you see Joe Fish in the office of O. B. Ballard at any time on the 29th day of April, 1912?

Mr. Currey: I object because it shows that the purpose is to have the witness testify with reference to a transaction with a dead man.

The Court: I am not so certain that Joe Fish's evidence is competent. I will permit him to testify Joe Fish wasn't in that office that day when he was down there.

A. No, sir, he wasn't.

(Witness dismissed)

Mr. Ewert: In view of the fact that they have offered Defendant's Exhibits #32 to #44, inclusive, it will be necessary as I have stated to complete the record down to date on the question of title, and I ask the reporter to kindly mark the papers I am handing him. I offer in evidence Plaintiffs' Exhibit #12, being an assignment from Mollie McCullough to W. P. McCullough on a one-fourth interest in and to the Hopper lease.

Mr. Thompson: We object to that if the court please for the reason it is incompetent, irrelevant and immaterial and appears to be an instrument executed in April, 1917, after the filing of this suit.

Mr. Ewert: It appears among the exhibits that they have offered is an assignment from McCullough to his wife.

The Court: Subsequent to the time the suit was filed?

Mr. Ewert: Both of those.

The Court: I will let it go in and pass on it later.

Mr. Ewert: And Plaintiff's Exhibit #13, and assignment from Hopper to J. P. and Ray McNaughton of a two-thirds interest. Plaintiffs' Exhibit #14 being an assignment from Dallas Hopper to James C. Briggs of a twelfth interest. And Plaintiffs' Exhibit #15, being an assignment from Ray McNaughton to J. P. McNaughton of an undivided one-half interest in two-thirds of the Hopper lease, from Ray McNaughton to his father, J. P. McNaughton. And Plaintiffs' Exhibit #16, being an as-

signment from J. P. McNaughton to W. P. McCullough of a two-thirds interest of the Hopper lease.

Mr. Thompson: The only objection we have to these your honor please is that Exhibits #13 and #14 are duplicates of other exhibits now in the case.

The Court: Very well, if they are duplicates I will strike them out.

W. P. McCULLOUGH, called as a witness on behalf of the plaintiffs in rebuttal testified as follows:

Direct Examination by Mr. Ewert.

Q. I show you Plaintiff's Exhibit #12 and ask you to tell the court the reason why after the beginning of this suit that you made an assignment of your interest in the mining lease to your wife and then had it reassigned afterwards?

Mr. Currey: We object to that for whatever the reasons were it could not affect the rights of the defendants in this case. It is incompetent for him to testify with reference to the purpose of the instrument.

The Court: Let him testify and I will rule on it.

A. In 1916 I was sick and my physicians just gave me sixty days to wind my business up and I assigned everything I had to my wife, I even turned over my farms. After that after I got on my feet a little bit then she reassigned to me.

Mr. Ewert: That is all.

Mr. Currey: I object and move that the answer be stricken out that whatever his reasons may be and particularly the reasons testified to cannot in any way affect the rights of the defendants in this case.

The Court: Very well, I will pass on it.

Mr. Ewert: Plaintiff now offers in evidence Exhibit #17, being an assignment from Hopper to Briggs and McCullough of two-thirty-seconds interest in the Hopper lease.

Mr. Davenport: If it isn't in there in the preliminary I had a certified copy of the assignment of Briggs to McCullough and I believe we have misplaced that.

Mr. Ewert: That will close our case with the exception of offering in evidence certified copies of instruments on record in the office of the register of deeds affecting this title so as to show title.

The Court: Now when you get them submit them to the other side so they can file other certified copies to meet them.

Mr. Currey: We have the same privilege?

The Court: Yes.

Mr. Ewert: Now at this time also in order to adjudicate the rights of all parties as the court shall find the rights of the parties to exist, we would like to have the remaining plaintiffs—or persons shown to be interested in the title of this land—made plaintiffs before judgment is entered, providing said persons will stipuate that they shall be made plaintiffs. It appears after this action was brought certain interests changed hands.

The Court: Get your stipulation and then offer it. You may reserve the right to offer the stipulation. Submit it to the other side so they can file any objection to it.

Mr. Ewert: And with that we close.

And thereafter and on July 4, 1919, the following proceedings were had:

Mr. Ewert: May it please the court, in the matter of McCullough vs. Smith, I wish to speak to the court of a matter which of course addresses itself to the sound discretion of the court, and that is I would like to have the court for a few minutes reopen the case in order to offer certain testimony of Joe Fish adduced at the preliminary hearing of the matter upon the hearing of the preliminary injunction in this case. Now your honor will recall that the pleadings state as a defense that the mining lease in question was executed in the office of Mr. Ballard and placed in his hands in *excrow*. At the hearing on the preliminary injunction Joe Fish testified that in the presence of Ballard and Hopper it was agreed that this lease should be placed in escrow with Mr. Ballard and that it was so placed. Now at the time of the trial here day before yesterday Joe Fish talks very low and with these fans running I couldn't always hear what he said but it appears that the time he fixed the conversation between his father and Hopper was on the way up to Mr. Ballard's office.

The Court: I will permit you to reopen but you will have to bring Joe Fish back and lay the predicate.

Mr. Ewert: We have here the stenographer's re-

port if they will admit Joe Fish did so testify then we can just read it into the record instead of bringing Joe Fish.

The Court: I will give you a chance to bring him back here.

Mr. Ewert: Very well, I will try to get him back here tomorrow morning.

And thereafter and on July 9, 1919, the following proceedings were had:

JOSEPH P. FISH, having been recalled, testified as follows:

Examination by Mr. Davenport.

Q. You are the same Joe Fish that testified about a week ago in this case? A. Yes, sir.

Q. You testified in November, 1907, didn't you, Mr. Fish, in this case, in the same case as this case you testified in last week or the week before, I say it was the same case McCullough vs. Smith? A. Yes, sir.

Q. In November, 1917, when you testified that was in a preliminary proceeding with reference to injunction was it not? A. Yes, sir.

Q. And the same attorneys appeared of record then Mr. Thompson and Currey for the defendant and Mr. Towne, Mr. Ewert and myself were here at the hearing, were we not?

A. I believe you were, yes, sir.

Q. I will ask if in your direct examination on the hearing on November 15, 1917, this question wasn't propounded to you and if you didn't give the following answer: "Q. Just state Mr. Fish what agreement your father had in your presence with Dallas Hopper with reference to the delivery of this mining lease. A. They went up and executed the lease and my father says I haven't got the team yet, haven't made arrangements about the team yet, and Mr. Hopper said well let Mr. Ballard go over and put the lease in escrow until you get the sixty-five dollars and team."

Mr. Thompson: If the court please, I don't think that is a correct statement of the record.

The Court: Well, just ask him what he said.

Q. Was that question propounded and answer given that I have read you, Mr. Fish? A. Read it over again.

(Question read by the reporter)

A. You mean do I remember all that was said?

The Court: Well, if you testified that.

Q. The question I read and the answer that I read to you were they given by you? A. The answer you read there?

Q. Yes. A. I guess it was.

Q. I will ask if in the same hearing and examination on the 17th of November, 1917, you were asked the following question and gave the following answer: "Q. Where was it to be put?" and did you not answer: "In the Miami Savings Bank." And the following question was asked and answered by you: "Who was Mr. Ballard?"

The Court: Well let him answer one at a time.

Mr. Davenport: I thought he had answered. I understood him to say "Yes, sir."

The Court: Very well.

A. Yes, sir.

Q. "Who was Mr. Ballard? A. The Notary Public that drew up and acknowledged the lease." Did you give that answer? A. Yes, sir.

Q. Was the following question propounded to you and the following answer given by you: "How late in the afternoon or evening was it that this lease was delivered to Ballard? A. Well just before dinner." Did you give that answer? A. Yes, sir.

Q. Was the following question: "You are sure about that are you? A. Yes, sir." Was that asked you and you answered? A. Yes, sir.

Q. Was the following question: "And that was the same date it was executed or was it the next day? A. You mean the day that they signed the lease you mean? Q. That they turned it back to him to hold until this contract was carried out? A. Well, it was supposed to be held right there until he went down and got the team, the way I understood the conversation between Mr. Ballard and Mr. Hopper and my father." Was that question propounded and that answer given, Mr. Fish? A. Yes, sir.

Q. And the following question: "Who was present at that time? A. Mr. Ballard was across the street afterwards. Q. Mr. Ballard present when your father and Hopper had that conversation? A. Yes, sir. Q. Where was it had at? A. What is that? Q. Where was it at? A. In his office. Q. Mr. Ballard's office? A. Yes, sir. Q. Where was his office at that time? A. Miami." Were those questions propounded to you and answered as I have read to you, Mr. Fish? A. Yes, sir.

Q. I believe you stated that was in November, 1917, in the hearing? A. Yes, sir.

The Court: You say that testimony was given by you on the hearing on injunction in 1917?

A. Yes, sir.

The Court: Before Judge Campbell?

A. Yes, sir.

The Court: Is that all.

Mr. Davenport: I believe that is, your honor please.

Examination by Mr. Thompson.

Q. Mr. Fish, as a part of that examination was not this question asked you and your answer given as follows: "Go ahead, Mr. Fish, state the circumstances and the agreement made in your presence between your father and Dallas Hopper with reference to executing and delivering to him the mining lease that he claimed and afterwards did record? A. You mean the whole?" Do you remember that?

A. Yes, sir.

Q. "Yes, sir. A. Well Mr. Hopper came to my father and wanted a mining lease a number of times and my father finally agreed to execute him one on certain conditions." You remember that?

A. Yes, sir.

The Court: Why can't you put all that testimony in?

Mr. Davenport: We didn't think it was material only on those questions.

The Court: Why not agree that is his evidence? They have a right to introduce all of it. Will you agree that is a correct copy of his evidence?

Mr. Davenport: I haven't examined it but I suppose it is. I presume, if your honor please, it is because there was a number of copies made.

Mr. Thompson: I am willing to let his whole testimony go into the record.

Mr. Davenport: I don't think it is all admissible.

The Court: Well subject to objection, you all have a copy and you can compare it.

Mr. Davenport: If the court please I will make the objection. The plaintiff objects to the introduction.

The Court: The defendant offers a transcript of all of the witness' evidence given on this preliminary trial. It is understood that it may go in subject to objections to the competency of the evidence and these objections can be later all pointed out in detail by the plaintiff.

Mr. Thompson: Now that is the testimony of Joe

Fish taken on the 15th day of November, 1917, before Judge Campbell.

The Court: Very well. This is the evidence given by him on November 15, 1917, before Judge Campbell. Now this transcript goes in and now you have the privilege of examining this transcript and comparing it.

Mr. Davenport: We don't object to any part of the cross examination about which we interrogated Mr. Fish at this time.

The Court: I understand, if there is any part of that evidence that is not competent in this case. It looks to me like all of it would go in. This is a question of contradiction.

Mr. Davenport: That is all, if the court please.

Mr. Thompson: Now that closes this case?

Mr. Davenport: Yes, sir.

The Court: Very well.

The testimony of JOSEPH P. FISH given on November 15, 1917, at Muskogee before Honorable RALPH E. CAMPBELL, Judge presiding, upon application for preliminary injunction, offered and admitted in evidence as above stated is as follows:

And thereupon, JOE P. FISH, being called as a witness on behalf of the defendant, sworn and under oath, testified as follows:

Direct Examination by Mr. Thompson.

Q. You are Mr. Joe P. Fish? A. Yes, sir.
Q. How old are you, Joe? A. Twenty two.
Q. Where do you live? A. Century, Oklahoma.
Q. Your father was Leander J. Fish? A. Yes, sir.
Q. When did he die? A November 20th, 1914.
Q. Mr. Fish, prior to his death and for several years prior thereto, I wish you would state to the court whether or not it was the custom and practice of you and your father to always be together in your business transactions?

Mr. Ewert: Now, may it please the court, we object to any testimony being given relative to the issues of this case by this witness for the reason that the witness has been adjudged an incompetent under the insane statutes of the State of Oklahoma by the Probate Court of Ottawa County and sustained by the District Court of Ottawa County.

The Court: Well, you can show that. I will hear the testimony and will consider it with that in connection with that record

A. Well, my father and I were most generally together.

Q. Do you remember, Joe, of being with your father some time in the spring of 1912 when he made some kind of a contract or agreement with Dallas Hopper regarding a mining lease? A. Yes, sir.

Q. State to the court what it was.

Mr. Davenport: If the court please, we desire to object to that or any oral testimony of this witness.

The Court: Was it an oral agreement or written?

Mr. Thompson: The agreement to make a lease, and agreement with reference to the delivery of a lease. We plead, if your honor please, that it was to be placed in escrow until certain monies and securities were secured by Hopper which was never done.

The Court: This testimony is in relation to whether or not there was ever an actual delivery of this lease?

Mr. Davenport: We object to that, if the court please. If it was placed in escrow, the party who had custody of it, with whom it was placed——

The Court: If the escrow agreement was verbal, of course this witness' testimony will be competent to say that if he knows. If it was in writing, the writing is the best evidence.

Mr. Davenport: We except, your honor.

Mr. Towne: We offer the further objection that the deceased, the Leander J Fish, his father, is now deceased and this is an attempt to establish a conversation between him and Hopper, this witness is interested in that estate, interested in this controversy.

Mr. Thompson: No rule in the world, if your honor please, that would exclude that testimony.

The Court: I think not. The objection is noted, overruled, and exception noted.

Q. Go ahead. Mr. Fish, state the circumstances and the agreement made in your presence between your father and Dallas Hopper with reference to executing and delivering to him the mining lease that he claimed and afterwards did record? A. You mean the whole?

Q. Yes, sir?

A. Well, Mr Hopper came to my father and wanted a mining lease a number of times and my father finally agreed to execute him one on certain conditions.

Q. Well, where was this talk when you agreed?

A. That was in Dartees Pool Hall, at Miami.

Q. And what was the talk and agreement between Hopper and your father?

A My father agreed that he would execute him a mining lease if he would furnish him with sixty five dollars in cash I believe it was, and a team.

Q. Any particular team?

A. One that belonged to Mr. Forrest Rawlings, and they went down and looked at it.

Q. What agreement did they reach, was the contract or lease executed?

A. The contract was executed and Mr. Hopper said we will go down and get Mr. Wagner to sign a note with me and get the team for you.

Mr. Towne: If the court please, we object to this as incompetent, irrelevant, and immaterial, for the reason that it is an attempt to verify the terms of a written contract.

The Court: Verify it or vary it.

Mr. Towne: Vary it I mean.

The Court: All the court is considering this for now is as to the delivery of the lease, not as to what the terms of the lease were. I understand that this is offered in support of counsel's contention that this lease was never in fact delivered to the lessee and it is only that feature of the agreement in which the court in interested.

Mr. Towne: They are not asking him about the delivery but about the contract.

The Court: Asking about the conversation that took place there, that is the only thing.

Q. Just state, Mr. Fish, what agreement your father had in your presence with Dallas Hopper with reference to the delivery of this mining lease?

Mr. Davenport: If the court please, I think they ought to ask him to state the conversation.

The Court: He may state what was said between the parties about this lease.

Q. Go ahead.

A. Well, my father said all right we will go up and execute the lease and go down and get the team. Mr. Hopper previous to that had went around and saw Mr. Wagner and told my father he had and said that Mr. Wagner had agreed to sign a note and had Mr. Rawlings bring up the team to his place.

Mr. Towne: I object to that statement as to what his father said.

Mr. Thompson: It was made in the presence if the court please of Dallas Hopper.

The Court: Overruled.

Mr. Davenport: Exception.

A. And he said all right, and they went up and executed the lease and my father says I haven't got the team yet, haven't made arrangements about the team yet. Mr. Hopper said well, let Mr. Ballard go over and put the lease in escrow until you get the sixty five dollars and team.

Q. Where was it to be put?

A. In the Miami Savings Bank.

Q. Who was Mr. Ballard?

A. The notary public that drew up and acknowledged the lease.

Q. What was done with reference to getting the team?

A. Well Mr. Hopper never delivered the team, never got the team for my father.

Q. Did you go down to Hopper and inquire about whether this indorsement was secured?

A. Yes, sir, went down and Mr. Hopper said that Mr. Wagner had refused later to sign the papers with him.

Q. Do you know whether or not the papers were then delivered to Hopper with the consent of your father?

A. The lease?

Q. Yes, the lease? A. No, sir, it was not.

Q. Did your father ever secure that cash or that team?

A. No, sir.

The Court: Any cross examination?

Mr. Davenport: We want to interpose a motion. The plaintiff moves to strike from the record all the evidence given by the defendant, because first it is incompetent, irrelevant and immaterial, and is an effort to vary the terms of a written contract by oral testimony; and second, because he is testifying as an innocent party in the result of this law suit being the son of the lessor who is now deceased, and under our statute we think is not entitled to testify.

The Court: Have you that statute here?

Mr. Davenport: No, sir, if the court please.

The Court: I will overrule it for the present, my judgment is—save your exception.

Mr. Davenport: Exception.

The Court: I will reserve ruling on that motion. I will not rule this evidence out until I know something furthere of the statute applying. Anything further?

Cross Examination by Mr. Towne.

Q. Joe, you are one of the heirs of Leander J. Fish, deceased? A. Yes, sir.

Q. You are interested in this royalty from this lease, are you not? A. Yes, sir.

Q. Were you present when this lease to Dallas Hopper was delivered or when he had it recorded, or when he had it recorded? A. When he had it recorded?

Q. Yes? A. No, sir.

Q. Do you know how soon after it was executed that it was recorded?

A. I think it was recorded that evening or the next morning.

Q. Now, how late in the afternoon or evening was it that you—that this lease was delivered to Ballard?

A. Well, just before dinner.

Q. Just before dinner? A. Yes, sir.

Q. You are sure about that are you? A. Yes, sir.

Q. And that was the same date it was executed or was it the next day?

A. You mean the day that they signed the lease you mean?

Q. That they turned it back to him to hold until this contract was carried out?

A. Well, it was supposed to be held right there until he went down and got the team, the way I understood the conversation between Mr. Ballard and Mr. Hopper and my father.

Q. Who was present at that time?

A. Mr. Ballard was across the street afterwards.

Q. Mr. Ballard present when your father and Hopper had that conversation? A. Yes, sir.

Q. Where was it had at? A. What is that?

Q. Where were they at? A. In his office.

Q. Ballard's office? A. Yes, sir.

Q. Where was the office at that time? A. Miami.

Q. What building?

A. At a little office that is occupied by a candy store now I think one across from your office.

Q. That was in 1912, was it, Joe? A. Yes, sir.

Q. Your father died in 1914? A. Yes, sir.

Q. And never took any action to cancel that lease from that time until his death, did he?

A. No, sir, he never started action in court, but he went

to him after that, to Mr. Hopper and asked him to release it and posted notice on the farm.

Q. I say he never commenced any action to cancel it?

A. No, sir, no suit.

Q. And he received the royalty there from it, didn't he?

A. Not from that lease.

Q. Didn't he receive money in lieu of this work?

A. No, sir.

Q. Do you know whether he did not?

A. He told me that he hadn't.

Q. Do you know whether he did or did not?

A. I can't say positively, I have his own words for it though.

The Court: It is clear that he only has his father's word, he doesn't know.

Redirect Examination by Mr. Thompson.

Q. Did your father ever go to McCullough in your presence or Mr. Hopper in your presence and seek to obtain a release from this lease? A. Yes, sir.

Q. What was the conversation, Joe, in your presence?

A. My father went to Mr. Hopper and told him that he had never furnished him with the money and team as he agreed to and never went on the ground and went to work as he agreed to, and told him that he would like to have a release for that lease; told him that he thought it was a cloud on the title and he would like to have him sign a release, and Mr. Hopper told him he would.

Q. Where did this conversation occur? A. In Miami.

Q. What part of Miami?

A. Just across the street from the court house, I don't know the name of the streets.

Q. Do you know whether or not your father had prepared a release of that lease? A. He had prepared it I think.

Q. What did Hopper say as to executing that release?

A. He said that he would, that he was in a hurry to catch some fellow down the street and would see him after while.

Recross Examination by Mr. Towne.

Q. Mr. Fish, you say this last conversation with Dallas Hopper and your father was had at the court house?

A. Across the street from the court house.

Q. What year and what month?

A. Some time after that, I don't remember the exact date.

Q. Well, the best of your recollection, that same year?

A. Yes, sir.

Q. Same year the lease was given?

A. I think the lease was given in the spring, I think it was, and that was along in the fall.

Q. Was that the last conversation they ever had about it so far as you know? A. So far as I know.

Q. Now, Joe, you have talked this matter all over with Smith, haven't you? A. I suppose so.

Q. About this lease not being delivered but being placed with Ballard, you have talked that over with Mr. Smith?

A. I told him as near as I could the circumstances as I understood it.

Q. He has been a very close friend of yours hasn't he?

A. Well——

Q. Looking after you financially and furnishing you finances all along, hasn't he? A. Well, not exactly.

Q. He has had an assignment hasn't he of this royalty in this particular lease from your father?

A. He bought two and a half per cent in the royalty from my father at one time.

Q. Which includes this royalty of this restricted land?

A. At that time it included all of it.

Q. And you had an incompetence proceeding in the District Court, didn't you?

The Court: The record is the best evidence of that. If you have the record I will take that.

Mr. Towne: If the court please, that is only preliminary to asking another question.

The Court: Ask the other question then.

Q. At that time Smith took a new lease from you for this hundred and twenty acres of land, didn't he, and you tried to be declared competent?

A. I wasn't tried to be declared competent, I was trying to defend myself against incompetence proceedings.

Q. At that time he held a lease from you?

A. No, not at the time the proceeding was started.

Q. Well, at the time of the trial?

A. No, sir, not at the time of the first trial.

Q. Well, the last one? A. Yes, sir.

(Witness dismissed.)

[CLERK'S NOTE: Note in parentheses is note of stenographer making transcript.]

(Note: The following exhibit is badly worn and where dashes occur the printing has been entirely obliterated.)

Plaintiffs' Exhibit #1.

BUSINESS LEASE—OIL AND MINING.

This Indenture, Made and entered into this 29th day of April, A. D. 1912, by and between Leander J. Fish, of the Quapaw Reserve, in Oklahoma, an allottee of the Quapaw tribe of Indians, party of the first part, and Dallas Hopper, of Miami, party of the second part, in pursuance of an Act of Congress approved June 7th, 1897,

Witnesseth: that the said part.. of the first part for and in consideration of the sum of one dollar to him paid by the said party of the second part receipt of which is hereby acknowledged, and in consideration of the rents and royalties, undertakings and agreements hereinafter stated to be paid and performed by the said party of the second part, his successors, assigns, and sublessees, does by these presents demise and lease unto the party of the second part, successors and assigns, and sub-lessees the following described tracts or parcels of .....:

> East half of Northwest Quarter and Southeast Quarter of the Northeast Quarter Section 32, Township 29, Range 23, East of the Indian Meridian, Oklahoma, containing One Hundred and Twenty *acs* (120) acres more or less for the term of ten years from the date hereof,

for the purpose of drilling, boring, digging, prospecting and mining for oil, gas, asphaltum, lead, zinc, coal and copper and all and every other kind or kinds of valuable mineral, ore, or fossil, or vegetable substance whatever, with the right to use as much of the surface of said land and so much of the building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations, also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery and pipe lines upon said premises for successfully carrying on the business of boring, prospecting and mining and prosecuting the object of this indenture, with the right to remove or sell any and all of said buildings, refineries, machinery and pipe lines, at any time or at the expiration of this lease.

In case there shall not be found in any well so drilled oil, gas, coal, copper or other ..... paying quantities, ... own use, and said party of the second part agrees to leave .... well in good shape for water, provided said first party pay for the casing therein contained or furnish new casing of the same quality to the second party, if oil or any mineral or other substances of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue as long as oil, minerals or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after the expiration of this lease.

Party of the first part reserves the right to go upon and visit said lands and mines at such times as may be desired to examine and ascertain the amount of product mined or produced thereon, said second party to have the free use of gas, oil, or coal to operate said property.

In consideration of which the said party of the second part hereby agrees and binds his executors, administrators, assigns, or sublessees to pay or cause to be paid to the party of the first part his executors, administrators, or assigns, at Miami, Okla., a sum of money equal to 5% per centum of the market value at the place mined or produced, of all oil, gas, asphaltum, lead, zinc, coal, copper and all other minerals or substances whatever, which may be mined or removed by the party of the second part, his executors, administrators, assigns, or sublessees for said lands herein leased, and such payment of royalty or rent shall be made on or before the 15th day of each calendar month during the continuance of this lease for all oil, gas, asphaltum, ore, minerals, products and substances above named, mined or removed from the land during the calendar month last preceding such date of payment.

Said party of the second part further covenants and agrees to exercise diligence in conducting said prospecting and mining operations, and to drill, bore, prospect, open and operate oil wells, shafts, drifts, and mines for the ores, minerals, products and substances above indicated, in a workmanlike manner, and the said party of the second part further covenants and agrees that he will keep an accurate account of said drilling and mining operations, showing the whole amount of oil, ores, etc., mined or removed, and that the party of the first part shall ..... such reasonable examination of the books of account as may be necessary to obtain all information desired as to the amount of products mined or removed from said land under this lease.

The party of the second part hereby agrees to begin operations on the above described premises within 90 days after the date of this lease; and in case such operations do not begin within said stated time, said second party agrees to pay to said first part 5c per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same.

In Witness Whereof, the parties of the first and second parts have hereunto set their hands, and seals the day and year first above written.

(Signed) Leander J. Fish, (Seal)
Dallas Hopper. (Seal)

Signed and sealed
in the presence of
(Signed) M. Duffy,
J. C. Willum.

State of Oklahoma, County of Ottawa—ss.

Before me, O. B. Ballard, a Notary Public within and for said county and State, on this 29 day of April, 1912, personally appeared Leander J. Fish and Dallas Hopper, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me, that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth. (Seal) (Signed) O. B. Ballard, Notary Public. My commission expires Nov. 16, 1913.

Endorsed: Mining lease from Leander J. Fish to Dallas Hopper E. NW. SE. NE. 32-29-23 4-29-12. State of Oklahoma County of Ottawa ss. This instrument filed for record this day Apr 29 1912 10 AM in the office of Register of Deeds, at Miami, Ottawa County, Oklahoma, and recorded in book 31 on page 167. (Signed) Lon Lampkin, Register of Deeds.

Plaintiffs' Exhibit #2.

Office of the County Clerk, Miami, Oklahoma.

CERTIFICATE OF TRUE COPY.

State of Oklahoma,
County of Ottawa—ss.

To All to Whom This May Concern, Greeting:

I hereby certify that the annexed copy of assignment of interest is a true and correct copy from the record which is in my custody in this office, same is of record in Book 42, page 565.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the Court House, City of Miami, Ottawa County, Oklahoma, this 22nd day of October, 1917.

J. A. Walker,
County Clerk and Ex-officio Register of Deeds.
(Seal) By (Signed) J. C. Briggs,
Deputy in Charge of Recording Dept.

ASSIGNMENT OF INTEREST IN MINING LEASE.

Know All Men by These Presents:

That I Dallas Hopper, lessee in a certain Mining Lease dated the 29th day of April, 1912, given by Leander J. Fish, as Lessor, leasing the following described lands, to-wit:

The East half of the North West Quarter, and the South East Quarter of the North East Quarter of Section 32, in Township 29 North, Range 23 East of the Indian Meridian, in Ottawa County, Oklahoma,

Said lease being recorded on the 29th day of April, 1912, in Book 31, at page 167 in the office of the Recorder of Deeds of Ottawa County, Oklahoma.

For and in consideration of the sum of One Dollar, and other valuable consideration to me in hand paid by W. P. McCullough, the receipt whereof is hereby acknowledged in and before the signing of this assignment, have granted, assigned, and set over to the said W. P. McCullough, his heirs and assigns, an undivided one sixth interest in and to all interests and rights which I now have or may accrue by virtue of the above lease.

In Witness Whereof, I have hereunto set my hand this 9th day of April, A. D. 1915.

Dallas Hopper.

State of Oklahoma, County of Ottawa—ss.

Before me, Geo. C. Brown, a Court Clerk in and for Ottawa County, Oklahoma, on this the 9th day of April, 1915, personally appeared Dallas Hopper, to me well known to be the identical person who executed the above and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal this 9th day of April, 1915.

Geo. C. Brown, Court Clerk,
(Seal) W. P. McCullough, County Clerk.

Filed for record April 9th, 1915, 10 A. M. Recorded in Book 42, at page 565. 42/565.

Plantiffs' Exhibit #3.

CONTRACT.

This indenture, made and entered into this 25th day of July, A. D. 1916, by and between W. P. McCullough and associates, of Miami, Oklahoma, party of the first part, and J S McAuley E M Hisle A H Skidmore and S L Walker of Columbus Kansas, parties of the second part.

Witnesseth That on terms and conditions hereinafter set forth and stated, the said party of the first part do.. hereby grant to the said partie*d* of the second part, their heirs or assigns, the right to move machinery upon, and prospect and mine for ores on the following tract or parcel of land, viz.:

West half of South East one fourth North East ¼ of Section 32, Township 26 Range 23 East of the Indian Meridian,

County of Ottawa, State of Oklahoma, being mining containing Twenty acres more or less, for the term or period beginning at this date and ending on the termination of the Dallas Hopper lease of April 29th, 1912, recorded at page 161, volume 31.

Considerations, terms and conditions as follows, to-wit:

Parties of the second part, their heirs or assigns, covenant and agree to thoroughly prospect said described land by sinking drill holes and shafts on said land, to prove the extent of the ore, and the richness thereof, and to develop the same and to give to the party of the first part a correct record and log of the holes drilled as soon as completed by delivering same at their office at Miami, Oklahoma.

Said party of the second part, their heirs or assigns, further agree to begin operations at once days from the date hereof and agree to *crowd* all work continuously for revenue to both parties. Delay caused by unavoidable accident, alone excepted.

All ores taken out during the prospecting period herein named may be cleaned up and marketed at the best price obtainable, and all checks, drafts, cash or credits for ores or other minerals sold from this land shall be made payable to the order of the Ottawa County National Bank Miami Okla., who shall at once upon the receipt thereof (and collections

duly made) return to the said parties of the second part (85) per cent thereof, and retain the remaining (15) per cent as their rent, or royalty, due parties of the 1st part.

Parties of the second part their heirs or assigns, shall timber and support all shafts and drifts with good, substantial and sufficient timber and cribbing when and where necessary; shall keep correct books and accounts of all ores and minerals mined under the provisions of this contract, the kind and weight thereof, to whom sold and the price received therefor, which books and accounts shall be open to the inspection of the party of the first part, or their agent at all reasonable times.

All ores and minerals mined and raised on said land, shall be cleaned for market on said land and weighed on scales owned or designated by party of the first part, and no ores or minerals from other lands shall be cleaned on said land without the written permission of party of the first part, or their agent.

Party of the first part, or their agent shall at all times have the right to inspect any and all mines shafts, drifts and workings in and upon the land described herein, and may use the machinery of parties of the second part for said purpose.

All tailings produced from the mill or mills on this ground during the term of this contract shall be the property of the first party after the first milling of the ore dirt, and the first party may enter said premises and remove same at will.

Party of the first part herein covenants and agrees, that in the event that the said parties of the second part, their heirs or assigns shall discover, or caused to be discovered upon described land, ores or mineral in substantial or paying quantities, and shall work mine and develop the same, and shall proceed to carry out the object of this indenture, or contract by erecting or building on said described property one or more modern mills, or such other crushing, cleaning, reduction or concentrating works as may be necessary to put in marketable condition the ore and minerals mined and raised on said land, then and in that event, it is hereby agreed and understood that the said party of the first part shall make, execute and deliver to the said parties of the second part their heirs or assigns a mining lease on the *twenty the termination* of the Dallas Hopper lease of April 29th, 1912.

The said mining lease shall be substantially of the form, and to the effect as set out in that certain form of mining lease attached hereto, and marked "Exhibit x."

It is further agreed and fully understood that in case the said parties of the second part, their heirs or assigns, do not prospect mine or develop said tract or parcel of land, or cause the same to be done, as hereinbefore set forth and stated, or shall fail in any particular to carry out the provisions of this contract, the same shall thereupon become void and of no effect whatever, and the said party of the first part may thereupon take possession of said tract or parcel of land without giving notice to quit, demand of possession, or any legal proceeding whatever.

The possession of said land for all purposes not consistent with the prospecting and mining as herein required or stated, and all surplus water not necessary or required by parties of the second part, are hereby reserved to the party of the first part.

In witness whereof, the said parties have hereunto set their hands the day and year first above written.

(Signed) W. P. McCullough
for himself & Associates (Seal)
J S McAuley (Seal)
E M Hisle (Seal)
A. H. Skidmore (Seal)
S. L. Walker

Witness to signatures .....

Plaintiffs' Exhibit #5.

(Plaintiffs' Exhibit No. 5 is a blue print prepared by C. E. Bidwell "Showing Explorations SE4 NE4 Sec. 32 T. 29 N. R. 23 E.")

[CLERK'S NOTE: Exhibit No. 5 not filed with statement of evidence.]

Plaintiffs' Exhibit #6.

To Dallas Hopper, J. P. McNaughton, Ray McNaughton, W. P. McCullough, J. C. Briggs, B. E. Beth, and their Associates:

You and each of you are hereby notified that the undersigned, W. M. Smith, is the owner of a valid mining lease on the East Half of the Northwest Quarter, and the West Half of the Northeast Quarter, and the Southeast Quarter of the Northeast Quarter, all in Section 32, Township 29, north of

Range 23, east of the Indian Meridian, Ottawa County, Oklahoma, and that said W. M. Smith has executed a sublease on said lands to L. C. Church and J. S. Mabon, and that said sublessees together with the landlord, W. M. Smith, have been in possession of said lands under said lease for at least one year last past, and extensive mining prospecting and developments have been and are now being made and done, and said sublessees are now in open, exclusive and notorious possession of said premises, and it has come to the attention of the undersigned that you and your associates contemplate taking possession of said premises without the consent of the undersigned, and without any legal process and over the objection and protest of the undersigned.

You are therefore notified and warned to keep off of said premises above described, and that the undersigned are in possession of said premises rightfully, and that you have no rights therein, and that if you attempt to take possession and move upon said premises proceedings will be started against you in forcible entry and detainer, and also under section 2574 of the Revised Laws of the State of Oklahoma of the year 1910.

This 31st day of May, 1915.

(Signed) W. M. Smith
L C Church
J. S. Mabon

Plaintiffs' Exhibit #7.

MINING LEASE.

This lease made this the 20th day of December, 1917, by and between W. P. McCullough, B. E. Beth, T. F. Phillips, Dallas Hopper, Paul A. Ewert, A. C. Towne, Theressa McClelland, E. M. Landrum, Frank Gaines and Peter McCullough, hereinafter referred to as parties of the first part and Thos. H. Williams hereinafter designated as party of the second part.

Witnesseth: That said parties of the first part for and in consideration of the covenants, agreements and royalties to be kept, performed and paid by party of the second part to said parties of the first part, according to their respective rights, do by these presents, demise and lease unto the said party of the second part for mining lead and zinc ores, the following described lands, to-wit:

The East Half (E2) of the Southeast Quarter (SE4) of the Northeast Quarter (NE4) of Section Thirty-two (32),

Township Twenty-nine (29), Range Twenty-three (23) East of the Indian Meridian in Ottawa County, State of Oklahoma, containing twenty- (20) acres more or less.

from this date until the 29th day of April, 1922.

Said second party shall commence drilling on said land with at least two drills within Thirty (30) days from this date and shall increase the drilling so as to determine within sixty days from this date whether there is mineral on same, sufficient to market at a profit and if mineral is found in sufficient quantities to market at a profit, said second party shall sink a shaft and construct and build a modern mill on said land and have the same in operation within five months from the date of this lease, said mill to be of not less than two hundred and fifty ton capacity; and said mining shall be carried on continuously and not cease, only on the written consent of parties of the first part. Unavoidable delays and delays for absolute necessary repairs to machinery and equipment, excepted. And said second party shall mine said land in a thorough and workmanlike manner, and keep all shafts and drifts securely timbered and supported and shall not remove any such timber or supports.

All mineral mined shall be cleaned, milled and prepared for market on said land, nor shall minerals from other lands be brought or cleaned on said land.

Said second party shall keep a correct book of account of all minerals mined, the grades and blends and to whom sold and price received, and dates of sale and weights and date shipped, and furnish copy thereof to first parties on request, and said books of account shall be open for inspection of party of the first part at least once a month.

Said party of the second part shall pay as royalty to parties of the first part a sum equal to fifteen (15) per cent of the market price of all ores sold, the same to be paid on the 15th of each month for all ores sold during the previous month. Provided that said first parties has the right to take all the ores mined at the market price at which said second party is marketing the same or quoted market price on the market.

Said second party shall have the right to erect all necessary buildings, mills, machinery, roadways, railways, tramways, dams and reservoirs necessary to carry on the mining operations in said lands and to remove all such buildings, mills and machinery at the expiration of or for forfeiture of this lease.

Pillars shall be left in said mine sufficient to support the roof and shall not be mined or removed without the written

consent of parties of the first part, and all chat from the mining of said land shall be the property and belong to party of the first part and all taxes levied upon or assessed on said minerals mined, if any shall be paid by party of the second part.

A failure to comply with any of the terms or conditions covenants or agreements herein on the part of the said party of the second part shall terminate and end this lease, and said parties of the first part shall be entitled to and shall have possession of said premises without any demand or notice other than a notice posted on said premises stating that if said default is not complied with in five days from such posting possession will be taken and said second party agrees to surrender possession at the expiration of said five days, if they have not complied with said default mentioned in said notice.

This lease shall be binding upon the parties hereto, their heirs, assigns, legal representatives, executors and administrators, and sub-lessors of party of the second part, subject however: Whereas; the title of the lessors is now in litigation, it is agreed and understood that this lease is made subject to the outcome of that litigation.

In Witness Whereof, said parties have hereunto set their hands and seals this the 20th day of December, A. D. 1917.

(Signed) W P McCullough (Seal)
A. C. Towne (Seal)
B. E. Beth (Seal)
Theresa McClelland (Seal)
E. M. Landrum (Seal)
Dallas Hopper (Seal)
Frank Gaines (Seal)
Thos. F. Phillips (Seal)
Paul A Ewert (Seal)
Parties of the First Part.

(Signed) Thos H Williams (Seal)
Party of the Second Part.

State of Oklahoma, County of Ottawa—ss.

Before me, the undersigned, a Notary Public within and for said County and State, on this 20 day of December, 1917, personally appeared, W. P. McCullough, B. E. Beth, Theresa McClelland, A. C. Towne, E. M. Landrum, Thos. F. Phillips and Frank Gaines, to me known to be the identical persons who executed the within and foregoing instrument, and acknowl-

edged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and affixed my official seal as such Notary Public this 20 day of December, 1917.

My commission expires, Nov. 14-1921.

(Seal) (Signed) John L. Crank, Notary Public.

State of Missouri, County of Jasper—ss.

Before me, the undersigned, a Notary Public within and for said County and State, on this 29 day of December, 1917, personally appeared Paul A. Ewert, to me *know* to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and affixed my official seal as such Notary Public this 29 day of December, 1917.

My commission expires, March 8, 1919.

(Seal) (Signed) Stella DeHoney, Notary Public.

State of Oklahoma, County of Ottawa—ss.

Before me, the undersigned, a Notary Public within and for said County and State on this 8th day of January, 1918, personally appeared Thos. H. Williams, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and affixed my official seal as such Notary Public, this 8th day of January, 1918.

My commission expires, March 13, 1920.

(Seal) (Signed) D. L. Towne, Notary Public.

State of Oklahoma, County of Ottawa—ss.

Before me, the undersigned, a Notary Public within and for said County and State, on this 21st day of December, 1917, personally appeared Dallas Hopper to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth.

(Seal) (Signed) D. L. Towne.

My commission expires March 18, 1920.

Endorsed: 210 63/558 State of Oklahoma Ottawa County This instrument filed for record Jan 2 '18 — 10:00 AM and recorded in Vo 3 page 568 J. A. Walker Co. Clk (Signed) J. A. Riley Dep. Thos H. Williams c/ Baxter Hotel Baxter Ks.

Plaintiffs' Exhibit #8.

AGREEMENT.

This Agreement between J. W. Coleman, W. A. McAtee, J. R. Woodfill, L. S. Coleman, M. T. Davis, J. C. Williams and C. H. Nichols, hereinafter called Trustees, Parties of the First Part, and Thomas H. Williams, Party of the Second Part, Witnesseth:

Whereas, the said Thomas H. Williams is now the owner and holder of a certain mining lease on and covering the following described real estate in Ottawa County, Oklahoma, to-wit:

East One-half (E2) of the Southeast Quarter (SE4) of the Northeast Quarter (NE4) of the Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23); east of the Indian Meridian.

And whereas, the above named Trustees hold as Trustees, the title to the mill and mill plant, tools, pumps, machinery, office equipment, lumber and other property belonging to the Aurora Union Minding Company, and now located on the East One-half (E2) of the Northeast Quarter (¼) of Section Eighteen (18), Township Twenty-six (26), Range Twenty-five (25) in Lawrence County, Missouri.

Now, therefore, the said Thomas H. Williams agrees to organize a corporation under the laws of the State of Oklahoma, with an authorized capital of $150,000.00 divided into shares of the par value of One Dolar ($1.00) each; the said corporation to be given such name as may be available and satisfactory to all parties.

He further agrees to convey his said lease on the property hereinbefore described to the said corporation;

And further agrees to have said corporation take the mill property hereinafter described in exchange for and for a consideration of $65,000.00 of the capital stock of said corpora-

tion to be paid and turned over to the Trustees hereinbefore named.

He further agrees to drill three (3) holes on said property in Oklahoma covered by his said lease, and agrees to drill said holes through the ore on said land, which will be to an approximate depth of One Hundred Eighty (180) feet.

He further agrees to sink a shaft in said land and put the mill plant on said Oklahoma lease, and put the plant in operation, free from all debts.

In consideration for the lease, moving the mill from Aurora and setting up the same, sinking the shaft and putting the plant in good and full operation, free from debts, he is to have the balance of the stock in said corporation, amounting to $85,000.00.

It is understood and agreed by the parties that this agreement shall not be considered in force and effect until said drill holes have been put down and show at least an average assay of Five (5%) per cent ore, and a face satisfactory to the said Trustees; if the said assay shall be less than five 5% per cent, or a face not satisfactory to the said Trustees, the said Trustees shall have the option either to comply or not to comply with this contract.

It is further understood and agreed, that in exchange for the said Sixty-five Thousand ($65,000.00) Dollars worth of stock, the mill and mill plant shall be taken as it stands on the property near Aurora, Missouri, as hereinbefore described, and the said Williams or said corporation to be formed shall pay the expense of moving said mill plant to the Oklahoma lease hereinabove described. But the title to the mill plant and property shall not pass from the trustees until the said mill and property is moved and set up and in operation on the Oklahoma lease, and shaft sunk, and all ready for operation and the Company free from all debts and obligation.

The parties of the first part hereby agree that when said three (3) holes are drilled and show an average of Five (5%), and a face of ore satisfactory to them, that they will convey by a proper deed of conveyance to the said corporation to be formed as herein set out, all of the mill and mill plant, including the tools, pipes, tracks, pumps, machinery, office equipment, lumber and other personal property belonging to the mining and mill plant equipment of the Aurora Union Mining Company, and located on the Northeast Quarter (NE4) of Section Eighteen (18), Township Twenty-six (26), Range Twenty-five (25), Lawrence County, Missouri; in considera-

tion for the payment to them of $65,000.00 of the capital stock of the corporation to be organized as hereinbefore set out.

It is expressly understood that no debts or lien shall be made against the mill plant or against the corporation, up to and including the time when this agreement is fully complied with by the party of the second part, and neither shall the title to the mill plant pass from the trustees until this contract is fully complied with by the party of the second part.

It is further understood that the deeds of trust now on the mill plant shall remain thereon even when the plant is moved to Oklahoma until this contract is complied with; when so complied with said deeds of trusts shall be satisfied and released.

(Signed) M T Davis
J W Coleman
Ja—— R. Woodfil
L. S. Coleman,
C. A. McAtee
J. C. Williams
C. H. Nichols
Parties of the first part.
Thos H William
Party of the second part.

Plaintiffs' Exhibit #9.

NOTICE.

To Jesse M. Short, George Short, J. A. Wilson, V. Swineheart, A. C. Towne, Paul Ewert, W. P. McCullough and their agents and Servants:

You, and each of you are hereby notified that you are trespassers, without right, claim, title or interest, on the Northeast Quarter (N.E.4) of the Northwest Quarter (N.W.4) of Section Thirty-two (32) Township Twenty-nine (29) North Range Twenty-three (23) East, in Ottawa County, Oklahoma; that the undersigned have the sole possession of, and exclusive right to the possession of the aforesaid premises, and that you, and each of you will be held strictly accountable to the undersigned for any and all damages done by you or any of you or your agents and servants to the aforesaid premises and to the possession of the undersigned; that any and all things done by you or any of you, or your agents and servants on said premises are done without right, warrant, claim or in-

terest on your part and at your peril; that any property, machinery, equipment of any kind or character placed by you upon said premises are placed there by you without right and at your peril; that any entry by you or any of you, or by your agents or servants, upon the aforesaid premises or any part thereof is wrongful and without warrant, right, claim or interest, and constitutes a trespass against the possession of and rights in and to said property of the undersigned for which you will be held fully accountable in law.

Dated this 15th day of October, 1917.

(Signed) Edward Wilkins
C. H. Plumb
E. R. McClelland

Norman A. Cox
Hugh Dabbs
Attys. for C. H. Plumb, Edward Wilkins, and E. R. McClelland.

Ed Perry, Constable.

Plaintiffs' Exhibit #10.

ASSIGNMENT OF PART INTEREST IN MINING LEASE

For and in consideration of the sum of One Dollar in hand paid by Thomas F. Phillips, of Kingfisher, Oklahoma, I, Dallas Hopper, of Miami, Oklahoma, do hereby sell, transfer, set over and assign unto the said Thomas F. Phillips, his heirs, executors, and assigns, an undivided one-thirty-sixth interest in and to one certain mining lease executed by Leander J. Fish to the said Dallas Hopper covering the following described real estate, to-wit:

The East-half of the Northwest Quarter and the Southeast Quarter of the Northeast Quarter of Section thirty-two township twenty-nine, north range twenty-three, east of the Indian Meridian, in Ottawa County, Oklahoma.

Said mining lease dated the 29th day of April, 1912, executed by the said Leander J. Fish, filed in the Register of Deeds, Office on the 29th day of April, 1912, recorded in Book 31, at page 167, Ottawa County, Oklahoma.

In Witness Whereof, I have hereunto set my hand and seal this 4th, day of June, 1915.

Dallas Hopper.

State of Oklahoma, County of Ottawa—ss.

Before me, D. W. Cooter, a Notary Public, within and for

said County and State, on this 4th day of June, 1915, personally appeared Dallas Hopper, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the used and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth.

(Seal) D. W. Cooter, Notary Public.

My commission expires January the 5th, 1918.

Filed for record June 17th, 1915, 1 P. M. Recorded in Book 44, at page 41. W. P. McCullough, County Clerk. Mailed to Grantee, Kingfisher, Okla. (Person) 44/41
State of Oklahoma, County of Ottawa—ss.

I, J. C. Briggs, County Clerk in and for the above-named County and State, do hereby certify that the within and foregoing instrument is a full, true and complete copy of a like instrument now on file in my office at Book 44 page 41. Witness my hand and official seal this the 8th day of May, 1919.

J. C. Briggs, County Clerk.

(Seal) By Phil Roberts, Deputy.

Plaintiffs' Exhibit #11.

ASSIGNMENT OF INTEREST.

Know All Men by These Presents:

That I, W. P. McCullough, assignee in *in* certain mining lease dated the 29th, day of April, 1912, and Recorded on the 29th, day of April, 1912, in Book 31, at page 167, in the Office of the Register of Deeds (now office of the County Clerk), at Miami, Ottawa County, Oklahoma, covering the following lands, to-wit:

The East Half (E2) of the North-west Quarter (NW4) and the South-east Quarter (SE4) of the North-east Quarter (NE4) of Section Thirty-two (32), Township Twenty-nine (29), North Range Twenty-three (23), East of the Indian Meridian, in Ottawa County, State of Oklahoma.

For and in consideration of the sum of One ($1.00) Dollar and other valuable considerations, to me in hand paid by B. E. Beth do hereby grant, bargain, assign, set-over and convey to the above said B. E. Beth a one-eighth (⅛) undivided interest in and to the above lease, or which may accrue by virtue of said above lease.

In Witness Whereof, I have hereunto set my hand this 20th, day of May, A. D. 1915.

W. P. McCullough.

State of Oklahoma, County of Ottawa—ss.

Before me Geo. C. Brown, a Court Clerk, in and for Ottawa County, State of Oklahoma, on this 20th, day of May, A. D. 1915, personally appeared W. P. McCullough, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the used and purposes therein set forth.

Witness my hand and official seal this 20th day of May, A. D. 1915.

(Seal) Geo. C. Brown,

Court Clerk, in and for Ottawa County, Oklahoma.

Filed for record May 20th, 1915, at 1 P. M. and recorded in Book 42, at page 746. W. P. McCullough, County Clerk.

State of Oklahoma, County of Ottawa—ss.

I, J. C. Briggs, County Clerk in and for the above-named County and State, do hereby certify that the within and foregoing instrument is a full, true and complete copy of a like instrument now on file in my office at Book 42 page 746. Witness my hand and official seal this the 8th day of May, 1918. J. C. Briggs, County Clerk, by (Signed) Phil Roberts, Deputy (Seal)

Plaintiffs' Exhibit #12.

ASSIGNMENT OF INTEREST IN MINING LEASE.

Know All Men by These Presents: That I, Mollie J. McCullough, party of the first part, for and in consideration of the sum of One ($1.00) Dollar and other valuable consideration, the receipt whereof is hereby acknowledged, to me in hand paid by W P McCullough, party of the second part, at and before the granting of this assignment, have granted assigned, set over and conveyed to the said W P McCullough, his heirs and assigns, the undivided one-fourth (¼) interest in and to a certain mining lease bearing date of April 20th, 1912, Said lease having been given by one Leander J. Fish, to Dallas Hopper, and described as follows, to-wit:

East Half (E2) of Northwest one Fourth, (NW4) and South East one Fourth (SE4) of North East One Fourth, (NE4) Section Thirty Two (32) Township Twenty Nine

(29) Range Twenty Three (23) East of the Indian Meridian.

The said W P McCullough his heirs and assigns to have and to hold the same for the term set out in the original lease.

In Witness Whereof, I have hereunto set my hand and seal this 14th, day of April, 1917.

(Signed) Mollie J McCullough

State of Oklahoma, County of Ottawa—ss.

Before me James W Elliott, a Notary Public within and for said County and State personally appeared Mollie J McCullough, to me well known to be the identical person who executed the foregoing instrument, and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and official seal this 14th day of April 1917.

(Seal) (Signed) Jas W Elliott, Notary Public.

My commission expires Feby 24th, 1919.

Endorsed: 56.19—4-14-17 E2 NW4 & SE4 NE4 32-29-23 Mollie J. McCullough to W. P. McCullough, Assignment of ¼ interest 10 W P McCullough. State of Oklahoma, County of Ottawa ss. This instrument filed for record in the office of County Clerk, at Miami, Ottawa County, Oklahoma, and recorded in Book 56 .... page 19 Apr 16 1917 8 AM J. A. Walker, County Clerk, by J. C. Briggs Deputy. (Seal)

Plaintiffs' Exhibit #13.

Office of the County Clerk Miami, Oklahoma.

CERTIFICATE OF TRUE COPY.

State of Oklahoma,

County of Ottawa—ss.

To All to Whom This May Concern, Greeting:

I hereby certify that the annexed copy of Assignment of Interest is a true and correct copy from the record which is in my custody in this office, same is of record in Book 42, page 325.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the Court

House, City of Miami, Ottawa County, Oklahoma, this 22nd day of October, 1917.

J. A. Walker,
County Clerk and Ex-officio Register of Deeds.
(Signed) By (Signed) J C Briggs
Deputy in Charge of Recording Dept.

ASSIGNMENT OF INTEREST IN LEASE.

Know All Men by These Presents:

That I, Dallas Hopper, lessee in a certain mining lease, dated the 29th day of April, 1912, given by Leander J. Fish as lessor, leasing the following described lands, to-wit:

The East half of the Northwest Quarter and the Southeast quarter of the Northeast Quarter of Section Thirty two in Township Twenty-nine, Range Twenty three East, in Ottawa County, Oklahoma,

said lease being recorded on the 29th day of April, 1912, in Book 31 at page 167, in the office of the recorder of deeds of Ottawa County, Oklahoma, for and in consideration of the sum of One Dollar in hand paid to me by J. P. McNaughton and Ray McNaughton, the receipt hereof is hereby acknowledged, at and before the signing of this assignment, have granted, assigned and set over, and I do hereby assign and set over to the said J. P. McCaughton and Ray McNaughton, an undivided two thirds interest in and to all the interests and rights which have or may accrue by virtue of the above described lease.

In Witness Whereof, I have hereunto set my hand this 11th day of March, 1915. Dallas Hopper.

State of Oklahoma, County of Ottawa—ss.

Before me, Vern E. Thompson, County Judge of Ottawa County, State of Oklahoma, on this 11th day of March, 1915, personally appeared Dallas Hopper, to me well known to be the identical person who executed the above and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal this 11th day of March, 1915. (Seal) Vern E. Thompson,
County Judge of Ottawa County, Oklahoma.

State of Oklahoma, County of Ottawa—ss. This instrument filed for record March 11th, 1915, 8 A. M. Recorded in Book 42, page 325. W. P. McCullough, County Clerk.

Plaintiffs' Exhibit #14.

Office of the County Clerk, Miami, Oklahoma.

CERTIFICATE OF TRUE COPY.

State of Oklahoma, County of Ottawa—ss.

I hereby certify that the annexed copy of assignment of interest is a true and correct copy from the record which is in my custody in this office, same is of record in Book 42 page 578.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the Court House, City of Miami, Ottawa County, Oklahoma, this 22nd day of October, 1917.

J. A. Walker,

County Clerk and Ex-officio Register of Deeds.

(Seal) By (Signed) J C Briggs

Deputy in Charge of Recording Dept.

ASSIGNMENT OF INTEREST OF MINING LEASE.

Dallas Hopper to James C. Briggs.

Know All Men by These Presents:

That I, Dallas Hopper, lessee in a certain Mining Lease dated the 29th day of April, 1912, given by Leander J. Fish, as lessor, leasing the *the* following described lands, to-wit:

> The East Half of the North West Quarter and the South East Quarter of the North East Quarter, of Section 32, Township 29 North, Range 23 East of the Indian Meridian, in Ottawa County, Oklahoma,

Said lease being recorded on the 29th day of April, 1912, in Book 31, *at page 31,* at page 167 in the Office of the Recorder of Deeds of Ottawa County, Oklahoma.

For and in consideration of the sum of One Dollar and other valuable considerations, to me in hand paid, by James C. Briggs, the receipt whereof is hereby acknowledged, in and before the signing of this assignment, have granted, assigned, and set over to the said James C. Briggs, his heirs and assign, an undivided one twelfth interest in and to all the interests and rights which I may now have, or may accrue by virtue of the above lease.

In Witness Whereof, I have hereunto set my hand this 10th day of April, A. D. 1915.

Dallas Hopper.

State of Oklahoma, County of Ottawa—ss.

Before me, W. P. McCullough, a County Clerk, in and for Ottawa County, State of Oklahoma, on this 10th day of April, 1915, personally appeared Dallas Hopper, to me well known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

(County Clerk's Seal) W. P. McCullough, County Clerk.

Filed for record April 10th, 1915, at 1 o'clock P. M. Recorded in Book 42, at page 578. W. P. McCullough, County Clerk. Mailed to Grantee City, 4-10-15 42-578.

Plaintiffs' Exhibit #15.

ASSIGNMENT.

Know all men by these presents:

That I, Ray McNaughton, for and in consideration of the sum of one dollar, cash in hand the receipt whereof is hereby acknowledged, to me paid by J. P. McNaughton, at and before the signing of this assignment, have granted, assigned and set over, and do hereby grant assign and set over any and all of any interest I may have in a certain mining lease dated April 29th, 1912, said lease having been given by Leander J. Fish to one Dallas Hopper, said lease covering the East half of the Northwest quarter and the Southeast quarter of the Northeast quarter of Section 32 Township 29, Range 23 East of the Indian Meridian in Ottawa County, Oklahoma; the interest herein sought to be assigned being any interest that I, the said Ray McNaughton may have acquired in said lease by reason of a certain assignment made by Dallas Hopper to J. P. McNaughton and Ray McNaughton. It is fully understood by the said Ray McNaughton and J. P. McNaughton that this assignment covers only such interest as the said Ray McNaughton may have by reason of the assignment from Dallas Hopper and this assignment carries no implied warranty of right, interest or title but is accepted by the assignee J. P. McNaughton with full knowledge of all the prior agreements and contracts which now or hereafter may affect the original lease on this tract as made by Leander J. Fish to Dallas Hopper.

Witness my hand this 10th day of June, 1915.

(Signed) Ray McNaughton.

State of Oklahoma, County of Ottawa—ss.

Before me Geo. C. Brown Court Clerk in and for said

County and State, on this 9th day of June 1915, personally appeared Ray McNaughton, to me known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth. Witness my hand and official seal this 9th day of June 1915 at Miami in Ottawa County, Oklahoma.

(Seal) (Signed) Geo. C. Brown Court Clerk.

My term of office expires the first Monday in January 1917.

Endorsed: 42/836J6/10/15. E2 NW4 & SE4 NE4 32-29-23. Ray McNaughton. J. P. McNaughton. 4784 State of Oklahoma County of Ottawa. ss. This instrument filed for record in the office of County Clerk, at Miami, Ottawa County, Oklahoma, Jun 10 1915 2PM and recorded in Book 42 page 836 W. P. McCullough, County Clerk, by (Signed) J. C. Briggs, Deputy (Seal)

Plaintiffs' Exhibit #16.

ASSIGNMENT OF MINING LEASE.

This Indenture, Made and entered into this 7th, day of April 1916 by and between J P McNaughton, of Miami Oklahoma, party of the first part, and W P McCullough, of Miami, Oklahoma, party of the second part,

Witnesseth, that the party of the first part for and in consideration of the sum of one Dollar and other valuable considerations to him paid by the said second party, the receipt whereof is hereby acknowledged, does hereby sell, assign, convey and set over to the party of the second part, his heirs, and assigns all of his rights title and interest in and to a certain mining lease dated April 29th, 1912, and recorded in Book 31, at page 167, of the records in and for Ottawa County, Oklahoma, in the office of the County Clerk, and Register of Deeds, covering the following described lands to-wit;

> The East half of the North West one Fourth, and the South East one Fourth of the North East one Fourth, all in Section 32, Township 29, Range 23 East of the Indian Meridian, Ottawa County, State of Oklahoma, containing 120, acres more or less;

Said above described lease haveing been given by one Leander J Fish, to one Dallas Hopper, and thereafter to-wit; on the 11th, day of March 1915, the said Dallas Hopper, transferred and assigned to the said J P McNaughton, and his son Ray McNaughton, an undivided Two-Thirds interest in said Lease;

It being further agreed between the parties hereto that the interest in said lease hereby assigned *in* an undivided Five Ninths (5/9), in said premises under said mining lease of April 29th, 1912, and the party of the first part hereby covenants that he is the present sole owner of a Five Ninths (5/9) interest therein,

Witness, My hand and Seal this 7th, Day of April 1916,

(Signed) J P McNaughton

State of Oklahoma, County of Ottawa—ss.

Before me Geo. C Brown, a Court Clerk in and for said County and State personally appeared J P McNaughton, to me well known to be the identical person who executed the within instrument and acknowledged to me that he executed the same as his own free and voluntary act and Deed, for the uses and purposes therein set forth.

(Seal) (Signed) Geo. C. Brown County Clerk,

By W. J. Farreman Deputy.

Endorsed: 4784 48/425—4/7/16. E2 NW4 & SE4 NE4 32-29-23. J. P. McNaughton, to W. P. McCullough. State of Oklahoma, County of Ottawa—ss. This instrument filed for record in the office of County Clerk, at Miami, Ottawa County, Oklahoma, and recorded in Book 48 page 425 Apr 7-1916 1 PM *Apr 7 1916 1 PM* W. P. McCullough, County Clerk, by J. C. Briggs, Deputy. (Seal)

Plaintiffs' Exhibit #17.

Office of the County Clerk Miami, Oklahoma

CERTIFICATE OF TRUE COPY

State of Oklahoma, County of Ottawa—ss.

To All to Whom This May Concern, Greeting:

I hereby certify that the annexed copy of Assignment of Interest is a true and correct copy from the record which is in my custody in this office, same is of record in Book 42 page 721

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the Court House, City of Miami, Ottawa County, Oklahoma, this 22nd day of October 1917.

J. A. Walker,

County Clerk and Ex-Officio Register of Deeds.

(Seal) By (Signed) J C Briggs

Deputy in Charge of Recording Dept.

ASSIGNMENT OF MINING LEASE.

Know All Men by These Presents:

That I Dallas Hopper, lessee in a certain Mining lease dated the 29th day of April, 1912, given by Leander J. Fish, as lessor, leasing the following described lands, to-wit:

The East half of the North West quarter, and the South East Quarter of the North East quarter, of Section 32, Township 29 North, Range 23 East of the Indian Meridian, in Ottawa County, Oklahoma,

Said lease being recorded on the 29th day of April, 1912, in Book 31, at page 167, in the office of the Register of Deeds of Ottawa County, Oklahoma.

For and in consideration of the sum of One Dollar ($1.00) and other valuable considerations, to me in hand paid, by James C. Briggs, and W. P. McCullough, the receipt whereof is hereby acknowledged, in and before the signing of this assignment, have granted, assigned, and set over to the said James C. Briggs, and W. P. McCullough, their heirs and assigns, *and* undivided Two Thirty-sixth (2/36) interest in and to all the interests and rights which I may now have, or may accrue by virtue of the above lease.

In Witness Whereof, I have hereunto set my hand this 15th day of April, A. D. 1915.

Dallas Hopper.

State of Oklahoma, County of Ottawa—ss.

Before me, Geo. C. Brown, Court Clerk, in and for Ottawa County, State of Oklahoma, on this 15th day of April, A. D. 1915, personally appeared Dallas Hopper, to me known to be the identical person who executed the within and foregoing instrument, and he acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal this 15th day of April, A. D. 1915.

(Seal) Geo. C. Brown,

Court Clerk, in and *fo* Ottawa County, Oklahoma.

State of Oklahoma, County of Ottawa—ss. This instrument filed for record May 13th 1915, 8 A.M. Recorded in Book 42, at page 721. W. P. McCullough, County Clerk.

Plaintiffs' Exhibit #18.

CERTIFICATE OF TRUE COPY.

State of Oklahoma, County of Ottawa—ss.

I, J. C. Briggs, County Clerk, within and for the above County and State does hereby certify that the attached and foregoing is a true and correct copy of a certain Assignment of Mining Lease that appears of Record in Book 46 at Pages 23-24 of the records of this office, and I so certify.

Witness my hand and official seal this 9th day of July AD 1919

(Seal) (Signed) J. C. Briggs,
County Clerk, Ottawa County, Oklahoma.

ASSIGNMENT OF INTEREST.

Know All Men by These Presents:

That I, J. P. McNaughton, in consideration of the sum of One and no/100 Dollars ($1.00), the receipt whereof is hereby acknowledged, to me paid on this 18th day of October, 1915, by W. P. McCullough, do hereby assign, set over and convey to the said W. P. McCullough an undivided one-ninth (1/9) interest in and to all the rights and privileges of a certain mining lease upon the following described lands in Ottawa County, Oklahoma, to-wit:

East Half of NW one fourth and South East one fourth of the North East one fourth all in Section 32, Township 29, Range 23,

said interest herein sought to be conveyed being one-ninth of the entire lease on said lands as executed by one Leander J. Fish to Dallas Hopper, said original lease from Fish to Hopper being dated the 29th day of April, 1912, and recorded in Book 31 at page 167 in the office of the recorder of deeds of Ottawa County, Oklahoma, it being fully understood by the said W. P. McCullough that this assignment is no guaranty of title or possession and conveys only such interest as the said J. P. McNaughton may have acquired by a certain assignment from Dallas Hopper to J. P. McNaughton and Ray McNaughton of the original lease; that is, to say that this assignment conveys one-ninth of the original lease, and it is understood that the said J. P. McNaughton retains five-ninths of the original lease, as the assignment from Dallas Hopper to J. P. and Ray McNaughton conveyed two-thirds of the original lease and Ray McNaughton assigned all of his interest to J. P. McNaughton, it is also understood that this assignment is made in lieu of an assignment for the said one-ninth, as herein

conveyed, which was to have been made by Ray McNaughton to W. P. McCullough but which was not executed or if executed has become lost.

Dated this 18th day of October, 1915.

J. P. McNaughton.

State of Oklahoma, County of Ottawa--ss.

Before me, Geo. C. Brown, a Court Clerk within and for said county and state, on this 18th day of October, 1915, personally appeared J. P. McNaughton to me known to be the identical person who executed the foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above set forth.

(Seal) Geo. C. Brown, Court Clerk.

Filed for record October 18, 1915-1-P.M. Mailed Grantee, City. 10-19-15. W. P. McCullough, County Clerk.

Plaintiffs' Exhibit #19.

CERTIFICATE OF TRUE COPY.

State of Oklahoma, County of Ottawa—ss.

I, J. C. Briggs, County Clerk, within and for the above County and State does hereby certify that the attached and foregoing is a true and correct copy of a certain Assignment of Mining Lease that appears of Record in Book 52 at page 30 of the records of this office, and I so certify.

Witness my hand and official seal this 9th day of July A D 1919

(Seal) (Signed) J. C. Briggs

County Clerk, Ottawa County, Oklahoma.

ASSIGNMENT OF INTEREST IN MINING LEASE.

For and in consideration of the sum of One Dollar ($1.00) and other valuable considerations, I hereby assign, set over and convey all my right, title and interest, in and to a certain mining lease from Leander J. Fish to Dallas Hopper, recorded in Book 31, page 167 to W. P. McCullough, covering the following described lands, to-wit:

The E2 of NW4 and SE4 NE4 of Section 32, Township 29, Range 23, East of the Indian Meridian, Ottawa County, Oklahoma,

The above assignment is made in lieu of a prior assignment which was lost before recording.

Witness my hand and seal this 28th day of June A D 1917.

J. C. Briggs

State of Oklahoma, County of Ottawa—ss.

Before me, the undersigned, a County Clerk within and for the above County and State on this 28th day of June A D 1917, personally appeared J. C. Briggs to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and seal as such County Clerk this 28th day of June A D 1917.

(Seal) J. A. Walker,

County Clerk, County of Ottawa, State of Oklahoma.

Filed for record June 28th 1917, 9:45 A. M.—J. A. Walker, County Clerk. (Mailed to Grantee 1228 Summit Muskogee.) 57/30

Plaintiffs' Exhibit #20.

ASSIGNMENT OF INTEREST.

I, Pete McCullough, for and in consideration of the sum of One Dollar and other valuable considerations does hereby assign, transfer, set over and convey unto W. P. McCullough, all my right, title and interest in and to one certain mining lease made by Leander J. Fish to one Dallas Hopper Dated April 29th 1912, and recorded in Book 31, at page 167, covering the following described lands to-wit:

The East-half (E2) of the North-West Quarter (NW4) and South-east Quarter (SE4) of the North-east Quarter (NE4) of Section Thirty-two (32), Township Twenty-nine (29) North Range Twenty-three (23) East of the Indian Meridian, Ottawa County Oklahoma.

The above assignment is given in lieu of a certain assignment that was made and lost before being placed of record.

In Witness Whereof I have hereunto affixed my signature this 9th day of July AD 1919

(Signed) Pete McCullough

State of Oklahoma, County of Ottawa—ss.

Before me the undersigned a Notary Public within and

for the above County and State on this 9th day of July 1919 personally appeared Pete McCullough to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

In Witness Whereof I have hereunto set my hand and official seal this 9th day of July A D 1919

(Seal) (Signed) J. W. Howard

Notary Public, Ottawa County. Oklahoma.

My commission expires May 14 1922

Defendant's Exhibit #1.

In the District Court of Ottawa County, Oklahoma. T. L. Robinson, W. P. McCullough, E. M. Landrum, and E. Stuckey, Plaintiffs, vs. J. E. Potterf, J. S. Maben, L. C. Church, Wesley M. Smith, Defendants.

PETITION.

The plaintiffs state that they reside in Ottawa County, and the defendants can be found there, and the land in question lies there. They state that on the 4th day of August, 1912, Leander J. Fish executed to the defendant Wesley M. Smith a mining lease which is as follows:

"MINING LEASE.

This indenture made and entered into this 4th day of November 1912 by and between Leander J. Fish party of the first part, and Wesley M Smith of Baxter Springs Kansas, party of the second part,

Witnesseth, That the said party of the first part, for and consideration of the sum of One Dollar to him in hand paid by said party of the second part, the receipt of which is hereby acknowledged, and in consideration of the rents or royalties, undertakings and agreements hereinafter stated to be paid and performed by the said party of the second part, his successors assigns, and sublessees do by these presents demise and lease unto the said party of the second part, his successors and assigns, the following described or parcels of land, viz.:

The East half (E2) of the Northwest Quarter (NW4) and the west half (W2) of the Northeast Quarter (NE4) of Section 32, Township 29, Range 23," east of the Indian Meridian Ottawa County Okla, containing 160 acres more or less, for the term of ten (10) years from the date hereof, for the pur-

pose of prospecting, mining, drilling, boring or digging for Oil, Gas, Asphaltum, Lead, Zinc and all *of* any other kind or kind of valuable mineral, ore, fossil *of* vegitable substance whater, with the right to use so much of the serface of said land and so much of the timber and building stone found thereon as may be properly needed to successfull- conduct said prospecting and mining operations, also the right of way over and accross said land whereon to construct and operate such line of lines *of* rail road as may be necessary to carry on and prosecute the object of this indenture, also the right to errect buildings refineries, machinery, pipe lines, tanks, concentrating mills, mining *da* rricks and pumping plants for the purpose of boring, prospecting, mining, and prosecute the object of this indenture with the right to remove or sell any and all of said buildings, refineries, concentrating mills, machinary, and pipe lines at any time, or at the expiration of the lease. In case there should not be found in any well so drilled, oil, gas, zinc, lead, or other substances in paying quantities, then the said party of the first part to have said well for his own use, and said party of the second part agrees to leave said well in good shape for water, provided said first party pay for casing therein contained or furnished new casing of the same quality to the second party. Party of the first part reserves the right to go upon and visit said lands and mines at such times as may be desired to examine and ascertain the amount of product mined thereon.

In consideration of which the said party of the second part agrees and binds his executors, administrators, assigns, and sub-leases, to pay or cause to be paid to the party of the first part his executors, administrators, or assigns at the office at party of the second part, a sum of money equal to five per centum of the market value at the placed mined or produced, of Oil, Gas, Asphaltum, Lead, Zinc, and all other minerals or substances whatever, which may be mined or removed by the said party of the second part, his executors, administrators, assings, or sub-leases from said land herein leased, and such payments, or royalty or rent shall be made on or before the 15th day of each calendar month during the continuance of the lease for all ore, minerals, products, and substances above named mined or removed from said land during the calendar month last proceeding such date of payment. Such payment of royalties to be paid at Bexter Springs Kansas, said party of the second part further covenants and agrees to exercise dilligence in conducting said prospecting and mining operations and to drill, bore and prospect, open and operate oil wells, shafts, drifts, and mines, for the ores minerals, products and substances above indicated, in workmanlike manner, And the said party of the second part further covenants and agrees

that he will keep an accurate account of said mining operation showing the whole amount of oil, ore, and etc, mined and removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired as to the amount of product mined or removed from said land under the lease.

The party of the second part hereby agrees to begin operations on the above described premises on or before June 30th, 1913, months after the date of this lease, and in case such operations do not begin within said stated time, said second party agrees to pay to said first party, cents per acre yearly, for each and every acre contained in this lease, in lieu of said work.

In Witness Whereof, the said parties of the first part and second parts have hereunto set their hands and seals the day and year first above written.

Signed and sealed in presents of,

Leander J. Fish (Seal)
Wesley M Smith

State of Kansas, County of Cherokee--ss.

Before me, John Jones, a Notary Public, within and for said County State, on this 21st, day of November 1912, personally appeared, Leander J Fish, and Wesley M Smith, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand .... seal the day and year above set forth.

John Jones,

My Commission Expires, Sept. 24th, 1913.

Filed for record 12-11-12-1-P. M. mailed to W. M. Smith, Bexter Springs Kansas 12-17-12. (Book 31, page 695) Lon Tompkin, Reg Deeds.

And said Leander Fish and Joseph P. Fish executed to W. M. Smith on the 6th of January, 1913, a mining lease which is as follows:

MINING LEASE.

This Indenture, Made and entered into this 6th, day of January A. D. 1913, By and between Leander J. Fish and Joseph P Fish of the first part County of Ottawa State of

Oklahoma, party of the first part and W. M. Smith of the County of Cherokee and State of Kansas, party of the second part.

Witnesseth That the said party of the first part for and in consideration of the sum of ten dollars to them paid by the second party of the second part the receipt of which is hereby acknowledged and in consideration of the rents and royalties undertakings and agreements hereinafter stated to be paid and performed, by the said party of the second part his successors, assigns, and subleases, do by these presents demise and lease unto the said party of the second part his successors and assigns, the following described tracts and parcels of land situated in the County of Ottawa and State of Oklahoma to-wit:

The Southeast Quarter (SE4) of the Northeast Quarter (*NW*4) of Section 32, Township 29, Range 23 East, containing in all forth acres more or less for the term of ten years from the date hereof, for the purpose of drilling, boring, digging, prospecting, and mining for oil, gas, asphaltum lead, zinc, and all and every other kind, or kinds of valuable mineral, or ore, or fossil or vegistable substance whatever, with the right to use so much of the serface of said land and so much of the timber and building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations, also the right of way over and across said land whereon to construct and operate such line or lines of wagon or Rail Road as may be necessary to carry on and prosecute the object of this indenture also the right to errect buildings refineries, machinery, and pipe lines of said premises for successfully carrying on the business of boring prospecting, and mining, and prosecuting the objects of this indenture, with the right to remove or sell any and all of said buildings refineries, machenery and pipe lines, at any time or at the expiration of this lease, in case there shall not be found in any well so drilled oil, gas, or other substances in paying quantities then the said party of the first part to have said well for their own use and said party of the second part agrees to leave said well in good shape for water.

Provided said parties pay for the casing therein containing or furnish new casing of the same quality to the second party, party of the first part reserves the right to go upon and visit said land and mines at such time as may be desired to examine and ascertain the amount of product mined or produced thereon.

In consideration of which the said party of the second part hereby agrees and binds his executors, administrators,

or assigns, or subleases to pay or cause to be paid to the parties of the first part their executors administrators, or assigns at their office a sum of money equal to Five per centum of the market value at the place mined or produced of all oil, gas, asphaltum lead, zinc, and all, other minerals, or substances whatever which may be mined or removed by the said party of the second part his executors, administrators, assigns, or sublessees, from said lands herein leased and such payment of royalty shall be made on or before the 15th day of each calendar month during the continuance of this lease for all oil, gas, asphaltum ore, minerals, products and substances above named, mined and removed from the land during the calendar month last proceeding such date of payment said party of the second part further covenants and agrees to exercise diligence in conducting said prospecting and mining operations and to drill, bore, prospect open and operate oil wells, shafts, and to drill for ore, minerals, products, and substances above indicated and in a workmanlike manner, and the said party of the second part further covenants and agrees that he will keep an accurate account of said mining operations, showing the whole amount of oil ore, and Etz, mined and removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired as to the amount of product mined or removed from said land under the lease.

The parties of the second part, hereby agree to begin operations on above described premises within 6 months after date of lease, and in case such operations do not begin within said stated time said second parties agree to pay to said first parties ten cents per acre, yearly, for each and every acre contained in this lease in lieu of said work Should said second party fail to comply with the terms of this lease at any time, said first party may give him written notices that unless said terms are complied with within thirty days from date of said notice, that said lease will be declared forfeited, after which said first party may enter upon and take possession of said preimses without further notice.

In Witness Whereof, Said parties have hereunto set their hands and seals, the year first above written,

Signed Leander J Fish (Seal)
Joseph P Fish, (Seal)
W. M. Smith (Seal)

State of Kansas, Cherokee County—ss.

Before me A. B. a notary Public in and for said County and State on this 7th day of January 1913, personally appeared Leander J. Fish and Joseph P Fish and W. M. Smith to me

known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the use and purposes herein set forth.

In Witness Whereof, I have hereunto set my hand and official seal the day and year last above written,

(Seal) John Jones, Notary Public.

My Commission expires Sept. 24th 1913.

Filed for record 1-11-13, 8 A. M. Mailed to W. M. Smith Box 94, Baxter Springs Kansas, 1-25-13, Lon Lampkin Reg. of Deeds.

That after executing said lease it became necessary to prospect the lands, and in order to get the prospecting done the defendant J. E. Potterf with the knowledge and acquiessance of the defendant Smith represented to the plaintiffs and their associates that he had valid sub-leases from the defendant Smith upon the property at a ten per cent royalty and requested the plaintiffs and other associates with them to join with him in developing the land and doing the work required of defendant Smith to hold the original lease, and the work required of him to hold his sub-leases and stated to them that if this was done their interest in this should be in proportion to the amount advanced, That pursuant to said agreement T. L. Robinson, W. P. McCullough, Byron White E. M. Landrum, Oscar Hadley and E. Stuckey advanced and paid for eight-sixteenths of the amount required to drill four holes on the property. Robinson, paying for 2/16 McCullough 1/16 and Stuckey 1/16 and Byron White and E. M. Landrum 2/16 and Oscar Hadley and W. P. McCullough 2/16, and all interests of White being purchased by E. M. Landrum and all interest of Hadley being assigned to W. P. McCullough. That the interests now held by the parties are as follows: T. L. Robinson 2/16 W. P. McCullough 3/16, E. M. Landrum 2/16, E. Stuckey 1/16, and the remaining interests were held by the defendant Potterf and his associates, That the management of the drilling was intrusted to defendant Potterf That said Potterf as a result of the drilling descovered that the land contained valuable deposits of Lead and Zinc, and after making the discovery he kept the discovery secret from plaintiffs, but informed defendant Smith of the Situation, That all the work required to keep alive the lease of defendant Smith from the original landlord was done by plaintiffs and the parties interested and defendant Potterf who with the knowledge and acquiesance of defendant Smith did the drilling under representations made to the plaintiff, of being the owner of the sub-

lease from Smith and collected the price of the drilling from plaintiffs in the proportion stated.

That after discovering ore in paying quantities existed on the land the defendant Potterf in violation of his duty to the plaintiff, colluded with defendant Smith and the defendant Smith in violation of the rights of the plaintiff, granted a lease on the property to the defendant J. S. Maben and L. C. Church at a 15% royalty, which said lease is as follows:

"This indenture, made and entered into this 21st day of June A. D. 1915 by and between W. M. Smith of Cherokee County Kansas, party of the first part and L. C. Church and J. S. Maben of Ottawa County Oklahoma,

Witnesseth, That the said party of the first part in consideration of the undertakings and agreements hereinafter set forth and stated to be kept and performed by the said parties of the second part, their heir and assigns, do by these presents demise and lease unto said parties of the second part their heirs and assigns, the following described tract of land, situated in Ottawa County and more particularly described as follows, viz:

"The East Half (E2) of the North West Quarter (NW4), The West Half of the Northeast Quarter (W2 of NE4) The South East Quarter of the North East Quarter (SE4 of NE4) of Section Thirty Two (32) Township Twenty Nine (29) Range Twenty three (23). Containing 200 acres more or less, for the term or period beginning at the date and ending at midnight on the first day of November A. D. 1922, upon the following terms and conditions, to-wit:

The said parties of the second part their heirs and assigns, shall immediately commence the work of mining said land, in good faith, shall place and have on said land sufficient pumps and machinery to drain the same of water, so as to permit the efficient mining thereof and shall properly operate the same and shall increase the capacity thereof from time to time as the same may become necessary.

Parties of the second part their heirs and assigns further covenant and agree to erect or build one or more modern mills, or such other crushing cleaning reduction or concentration works or plants as may be necessary to put in marketable condition the ores and minerals mined or raised on this land and to sink a sufficient number of shafts, and operate the same, as to keep said mill or mills and other concentration works in action, at least up to the standard.

The said parties of the second part their heirs and assigns, shall mine said land in a good and workmanlike way and manner, and shall keep all shafts and drifts well and securely cribbed timbered and supported and shall not remove the said cribbing, timbers, or supports, so as to endanger the ground or permit the same to fall in.

Mining shall be carried on in good faith continuously and shall not be suspended at the time to exceed ten days in any one month, without the written permission of the party of the first part or his agent. Delays caused by unavoidable accident, or caused beyond the control of the parties of the second part alone excepted.

Pillars shall be left in said mine or mines, where and wherever necessary to prevent the roof from falling, or the said mines from caving or falling in, and shall not be removed except on the written permission of the said party of the first part of his agent.

Party of the first part or his agent, shall have all times the right to inspect any and all mines shafts drifts, or workings, in and upon said lands, and may use the machinery of said parties of the second part for that purpose.

All ores or minerals mined or raised on said land, shall be cleaned and prepared for market on said land, and no rough or crushed stuff shall be removed therefrom to be cleaned. Nor shall any ore minerals or crushed stuff from other land be brought or cleaned on said land, without the written permission of the party of the first part or his agent.

It is further agreed that between the parties hereto that after ore has been discovred in apparently paying quantities and a shaft started that each forty acres thus effected shall immediately become a separate proposition and shall operate thereafter as a separate lease. All tailings produced from the mill or mills on this ground during the term of this contract shall be the property of the first party after the first milling of the ore dirt and the first party may enter said premises and remove same at will.

The said parties of the second part their heirs and assigns shall keep a correct account of all minerals mined, the kind and the weights thereof, to whom sold and the price received therefor, which books and accounts shall be open to the inspection of the said party of the first part, or his agent, at all reasonable times.

Any or all ores or other minerals sold from this land shall be weigned over scales of party of the first part.

All checks drafts, cash or other credits for ores or other minerals sold from this land shall be made payable to the order of the first party or his duly authorized agent, who shall at once on the receipt thereof (and collection duly made on said checks and other credits) return to the parties of the second part (85) Eighty Five, per cent thereof, and retain the remaining fifteen per cent as his rent, or royalty due at each sale or turn in of ores or minerals provided however, that the said party of the first part reserves the right and privilege at all times to take said ores or other minerals or any part thereof, paying the market price thereof, less the above named (15) fifteen per cent royalty.

The said parties of the second part their heirs and assigns, shall have the right to erect all necessary buildings and machinery on said land for the purpose of mining, dressing, crushing, and cleaning ores and minerals thereon, and to remove the same at the expiration or forfeiture of the lease, except timbering and other improvements necessary to support the ground.

No wording or sentence in this lease shall be construed as to permit parties of the second part, or other to move on, erect or build habitations or dwelling house on said land, or to conduct other business on said land, other than for mining, crushing, cleaning, and handling ores and minerals as contemplated in this lease without the written permission of the party of the first part or his agent.

All uses of this land not inconsistent with the proper mining, milling or handling of ores and minerals, as herein required and all surplus water not necessary or not required by the parties of the second part are hereby reserved to the party of the first part.

In the event that the said second party, their heirs and assigns, shall fail to fulfill and comply with any of the terms and conditions of this lease, this lease shall hereby become forfeited and terminated and the said party of the first part may hereupon at once take possession of said land without notice to quit, demand of possession or any legal proceeding whatever.

Subject to the above and foregoing terms, conditions and considerations, this lease shall remain in force from the date thereof, and until midnight on the first day of November, A. D. 1922.

In Witness Whereof, we have hereunto set our hands and

seals the day and year above written (to duplicate copies hereof).

Witness to Signatures:

W. M. Smith
L. C. Church.
J. S. Mabon,

State of Oklahoma, County of Ottawa—ss.

Before me, J. L. Spear, Notary Public, in and for said county and State, on this 21st day of June 1915, personally appeared J. S. Mabon, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as and free and voluntary act and deed for the use and purposes therein st forth.

In Witness Whereof, I have hereunto set my hand and seal the day and year last above written.

(Seal) J. L. Speer, Notary Public.

My Commission Expires June 2nd, 1917.

State of Oklahoma, County of Ottawa— ss.

Before me A. S. Thompson a Notary Public in and for said County and State, on this 14th day of July, 1915, personally appeared W. M. Smith and L. C. Church to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and seal the day and year last above written,

(Seal) A. S. Thompson, Notary Public.

My Commission expires, June 15, 1919.

Filed for record July 17th 1915 8 A. M. W. P. McCullough, County Clerk. Mailed to Pitcher Lead Co, Joplin (draft) Recorded in Book 44, page 181

That at the time of the making of said lease ore had been discovered upon the land, as a result of the means of the plaintiffs, but no notice was ever given the plaintiffs requiring further development prior to the making of said lease. And the plaintiffs were not advised that further development was required and that defendant Potterf with the knowledge of defendant Smith assured plaintiffs that it was not necessary to do further development in order to hold their interests. That under said last named lease further development has been had and the defendants Church and Maben have paid to defend-

ants Smith and Potterf a large amount of equity. That in equity and good consecious a 1/3 of the royalty paid and to be paid by the defendants Church and Maben belongs to the plaintiffs, namely:

W. P. McCullough 3/16, T. L. Robinson 2/16, E. M. Landrum 2/16 and E. Stuckui 1/16. That the defendants Potterf and Smith are now receiving said 5% advance royalty. The plaintiffs ask that the defendants Smith and Potterf, be required to account with them for the 1/2 of the 5% extra royalty that has heretofore been received, the exact amount of which is unknown to the plaintiff. They further ask that all of the defendants be required to account with the plaintiffs for 1/2 of the 5% extra royalty demandable under the lease, from and after the beginning of the suit for the defendants Maben and Church, and for a judgment for their costs and for all other relief in equity and good conscience they may be entitled.

(Signed) W. H. Kornegay Atty.

I, W. P. McCullough on oath do say that I am one of the above named defendants, and that the statements of the foregoing petition are true as I varily believe.

(Signed) W P McCullough

Subscribed and sworn to before me this 29th day of September 1916. (Seal—Ottawa County Court Clerk) (No signature attached)

Endorsed: 1586 W. P. McCullough et al. vs. J. E. Potterf et al. Petition W. H. Kornegy State of Oklahoma, County of Ottawa—ss. District Court. This Instrument was filed for record Sep 29 1916 Geo. C. Brown Court Clerk. By W. J. Farneman Deputy.

Defendant's Exhibit #2.

(Defts. Ex. #17. Unkle v. Wills.)

MINING LEASE.

This Indenture, Made and entered into this 4th day of November, 1912, by and between Leander J. Fish, of Ottawa County, Oklahoma, party of the first part, and Wesley M. Smith of Baxter Springs, Kansas, party of the second part.

Witnesseth: That the said party of the first part, for and in consideration of One Dollar to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, and in consideration of the rents or royalties, undertakings and agreements hereinafter stated to be paid and

performed by the said party of the second part, his successors, assigns, and sub-lessees, does by these presents demise and lease unto the said party of the second part, his successors and assigns, the following described tracts or parcels of land, viz:

The East half (E2) of the Northwest quarter (NW4) and the West half (W2) of the Northeast quarter (NE4) and the of Section 32; Township 29; Range 23

east of Indian Meridian, Ottawa County, Oklahoma, containing 160 acres more or less *acres, more or less,* for the term of ten (10) years from the date hereof, for the purpose of prospecting, mining, drilling, boring or digging for Oil, Gas, Asphaltum, Lead, Zinc and all and every other kind or kinds of valuable mineral, ore, fossil, or vegetable substance whatever, with the right to use so much of the surface of said land, and so much of the timber and building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations; also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery, pipe lines, tanks, concentrating mills, mining derricks and pumping plants, for the business of boring, prospecting mining and prosecute the object of this indenture, with the right to remove or sell any and all of said buildings, refineries, concentrating mills, machinery and pipe lines, at any time, or at the expiration of this lease. In case there shall be found in any well so drilled, oil, gas, zinc, lead or other substances in paying quantities, then the said party of the first part to have said well for his own use, and said party of the second part agrees to leave said well in good shape for water; provided said first party pay for the casing therein contained, or furnish new casing of the same quality of the second party. Party of the first part reserves the right to go upon and visit said lands and mines at such times as may be desired to examine and ascertain the amount of product mined thereon.

In consideration of which the said party of the second part agrees and binds his executors, administrators, assigns and sub-lessees to pay, or cause to be paid to the party of the first part, his executors, administrators or assigns, at office of party of the second part, a sum of money equal to five per centum of the market value at the place mined or produced, of all Oil, Gas, Asphaltum, Lead, Zinc, and all other minerals or substances whatever, which may be mined or removed by the said party of the second part, his executors, administrat-

ors, assigns, or sub-lessees from said land herein leased, and such payments, or royalty or rent shall be made on or before the 15th day of each calendar month during the continuance of this lease, for all ore, minerals, products and substances above named, mined or removed from the land during the calendar month last preceding such date of payment. Such payment of royalties to be paid at Baxter Springs, Kansas. Said party of the second part further covenants and agrees to exercise diligence in conducting said prospecting and mining operations, and to drill, bore, prospect, open and operate oil wells, shafts, drifts and mines, for the ores, minerals, products and substances above indicated, in workmanlike manner. And the said party of the second part further covenants and agrees that he will keep an accurate account of said mining operations, showing the whole amount of oil, ore, etc., mined or removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired as to the amount of product mined or removed from said land under this lease.

The party of the second part hereby agrees to begin operations on the above described premises on or before June 30th, 1913, and in case such operations do not begin within said stated time, said second party agrees to pay to said first party 10 cent per acre yearly, for each and every acre contained in this lease, in lieu of said work.

In witness whereof the said parties of the first and second parts have hereunto set their hands and seals the day and year first above written.

Leander J. Fish (Seal)
Wesley M. Smith (Seal)

Signed and sealed in presence of

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State of Kansas, County of Cherokee—ss.

Before me, John Jones, a Notary Public within and for said County and State on this 21st day of November, 1912, personally appeared Leander J. Fish and Wesley M. Smith, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth. (Seal) John Jones, Notary Public. My commission expires Sept. 24th, 1913.

Seal Filed for record 12-11-12 1 P M Lon Lampkin, Register of Deeds. Mailed W. M. Smith Baxter Springs Kansas. State of Oklahoma, County of Ottawa—ss.

I, J. C. Briggs, County Clerk in and for the above named County and State, do hereby certify that the within and foregoing instrument is a full true and complete copy of a like instrument now on file in my office at Book 31 page 695.

Witness my hand and official seal this the 8'' day of April 1919

J. C. Briggs, County Clerk.

(Seal) By (Signed) Phil Roberts, Deputy.

Defendant's Exhibit #18.

(Defendants' Exhibit #3. Unkle v. Wills.)

MINING LEASE.

This Indenture, Made and entered into this 6th day of January, A. D. 1913, by and between Leander J. Fish and Joseph P. Fish, of the first part, County of Ottawa, State of Oklahoma, party of the first part, and W. M. Smith of the County of Cherokee and State of Kansas party of the second part.

Witnesseth, That the said party of the first part, for and in consideration of the sum of Ten Dollars to them paid by the said party of the second part, the receipt of which is hereby acknowledged, and in consideration of the rents or royalties, undertakings and agreements hereinafter stated, to be paid and performed by the said party of the second part his successors, assigns, and sub-lessee, do by these presents demise and lease unto the said party of the second part his successors or assigns, the following described tracts or parcels of land situate in the County of Ottawa, and State of Oklahoma, to-wit:

The Southeast quarter (SE4) of the Northeast Quarter (NE4) of Section thirty two (32) township twenty nine (29) Range twenty three East (23 E),

containing in all forty (40) acres more or less for the term of ten years from the date hereof, for the purpose of drilling, boring, digging, prospecting and mining for oil, gas, lead, zinc, and all and every other kind or kinds of valuable mineral or ore, or fossil or vegetable substance whatever, with the right to use so much of the surface of said land and so much of the timber and building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations; also the right of way over and across said land

whereon to construct and operate such line or lines of wagon or railroad as may be necessary to carry on and prosecute the object of this indenture; also the right to erect buildings, refineries, machinery and pipe lines upon said premises, for successfully carrying on the business of boring, prospecting and mining, and prosecuting the objects of this indenture, with the right to remove or sell any and all said buildings, refineries, machinery and pipe lines at any time, or at the expiration of this lease. In case there shall not be found, in any well so drilled, oil, gas or other substances in paying quantities, then the said parties of the first part to have said well for their own use, and said party of the second part agrees to leave said well in good shape for water; Provided, said first parties pay for the casing therein contained, or furnish new casing of the same quality to the second party. Party of the first part reserves the right to go upon and visit said land and mines at such times as may be desired to examine and ascertain the amount of product mined or produced thereon.

In consideration of which the said party of the second part hereby agrees and binds his executors, administrators, or assigns, or sub-lessees to pay or cause to be paid to the parties of the first part their executors, administrators or assigns, at their office a sum of money equal to five per centum of the market value at the place mined or produced of all oil, gas, asphaltum, lead, zinc and all other minerals or substances whatever, which may be mined or removed by the said party of the second part his executors, administrators, assigns, or sub-lessees, from said lands herein leased and such payment of royalty shall be made on or before the 15th day of each calendar month during the continuance of this lease for all oil, gas, asphaltum, ore minerals, products and substances above named, mined and removed from the land during the calendar month last preceding such date of payment. Said party of the second part further covenants and agrees to exercise diligence in conducting said prospecting and mining operations, and to drill, bore, prospect open and operate oil wells, shafts, drifts and mines for the ores, minerals, products and substances above indicated, in a workmanlike manner. And the said party of the second part further covenant and agrees that he will keep an accurate account of said mining operations showing the whole amount of oil, ore, etc., mined or removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired as to the amount of product mined or removed from said land under this lease.

The parties of the second part hereby agree to begin operations on the above described premises within six months

after date of this lease, and in case such operations do not begin within said stated time, said second parties agree to pay to said first parties ten cents per acre, yearly, for each and every acre contained in this lease, in lieu of said work. Should said second party fail to comply with the terms of this lease at any time, said first party may give him written notice that unless said terms are complied with within thirty days from date of said notice, that said lease will be declared forfeited, after which said first party may enter upon and take possession of said premises without further notice.

In witness whereof, the said parties have hereunto set their hands and seals the day and the year first above written.

Leander J. Fish (Seal)
Joseph P. Fish (Seal)
W. M. Smith (Seal)

State of Kansas, Cherokee County, ss.

Before me, A. B., a Notary Public, in and for said county and State, on this 7th day of January, 1913, personally appeared Leander J. Fish, Joseph P. Fish and W. M. Smith, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

(Seal) John Jones, Notary Public.

My commission expires Sept. 24th, 1913.

Filed for record 1-11-13 8 AM. Lon Lampkin, Reg Deeds. Mailed to W. M. Smith, Box 84 Baxter Springs, Kansas 1 25 13. Book 34 page 77.

State of Oklahoma, County of Ottawa—ss.

I, J. C. Briggs, County Clerk in and for the above-named County and State, do hereby certify that the within and foregoing instrument is a full true and complete copy of a like instrument now on file in my office at Book 34 page 77.

Witness my hand and official seal this the 8 day of April 1919

J. C. Briggs, County Clerk,

(Seal) By (Signed) Phil Roberts, Deputy.

Defendant's Exhibit #4.

(Defendants' Exhibit No. 27. Unkle 1. Smith.)

CONTRACT FOR MINING LEASE.

This Agreement, Made and entered into this 8th day of July 1914, by and between W. M. Smith of Baxter Springs, Kansas, hereinafter designated as party of the first part, and L. C. Church and J. S. Mabon of Miami, Ottawa County, State of Oklahoma, hereinafter designated as parties of the second part.

Witnesseth, That the party of the first part does hereby give and grant to parties of the second part the right, for one year from date hereof, to go upon the following described premises in Ottawa County, State of Oklahoma, to-wit:

> The East half (E2) of the Northwest Quarter (NW4); the West half (W2) of the northeast quarter (NE4); and the southeast quarter of the north east quarter (SE4 of NE4) containing in all two hundred acres more or less of Section 32, Township 29, Range 23,

and to search and prospect for, and mine lead and zinc ores and other minerals thereon during such period, upon the condition that second party within thirty days from this date commence the prospecting of said land by drilling continuously with two drills for lead and zinc ores and other minerals, and carry on said work continuously during the life of said contract. The second parties hereto shall deliver to the said first party a true and correct log of all holes drilled together with a copy of the assay of each run of ore. Fifteen (15%) per cent of the gross price received for all zinc ores, and fifteen (15%) per cent of the gross price for all lead ores shall be paid party of the first part as royalty thereon.

If parties of the second part fail to comply with any of the conditions herein mentioned, this contract shall be void and the party of the first part may re-take possession of said premises by serving written notice of forfeiture of this contract at the last known address of the second parties hereto.

It is further agreed that if parties of the second part perform all conditions of this contract in good faith, and shall at any time develop lead and zinc ores upon said premises in sufficient quantities to make the mining and marketing thereof profitable, then the party of the first part, his successors and assigns, will properly execute and deliver to parties of the second part, their heirs and assigns, a mining lease upon the above described premises, expiring Nov. 1st, 1922, at a royalty of fifteen (15%) per cent of the gross price received for all

zinc ores, and fifteen (15%) per cent of the gross price received for all lead ores mined from said land. Said lease to contain all the terms and conditions generally used in leases for lead zinc mining in this vicinity, Marked Exhibit "A" and attached hereto. Second parties further agree to pay all damage to growing crops, grass land, etc. It is also agreed by the parties hereto that the first party shall have the right at any time during the life of this contract, to locate as many as three drill holes on the within lease, said holes to be drilled as deep as two hundred and fifty (250 ft) at the discretion of the first party. It is also agreed that after ore has been discovered in apparently paying quantities and a shaft started, that each forty (40) acres thus affected shall immediately become a separate proposition and shall operate thereafter as a separate lease under this contract and under the leases attached hereto and marked Exhibit "A".

In Witness Whereof, We have hereunto set our hands and seals this .... day of ..... A. D. 1914.

(Signed) W. M. Smith (Seal)

J. S. Mabon (Seal)

Witnesses (Signed) Mrs. E. Forb.

State of Oklahoma, County of Ottawa—ss.

Before me ....., a ..... within and for said County and State, on this .... day of ....., 190.., personally appeared ..... and ..... to me known to be the identical person.. who executed the within and foregoing instrument, and acknowledged to me that .... executed the same as .... free and voluntary act and deed, for the uses purposes therein set forth.

Witness my hand and ..... seal the day and year above set forth.

.....

My commission expires 190

Endorsed: Copy Mining Lease Contract from W. M. Smith to J. S. Mabon. Copies of this blank and all other standard forms may be procured at the City Book Store, Miami, Okla. Baxter & Einsel, Printers, Miami, Oklahoma.

Defendant's Exhibit #5.

"Exhibit A"—Mining Lease—(Form 5)

MINING LEASE.

This Indenture Made and entered into this 21 day of

June A. D. 1915, by and between W. M. Smith of Cherokee County, Kansas, party of the first part, and L. C. Church and J. S. Mabon of Ottawa County, Oklahoma, parties of the second part.

Witnesseth, That the said party of the first part, in consideration of the undertakings and agreements hereinafter set forth and stated, to be kept and performed by the said parties of the second part, their heirs, or assigns, does by these presents demise and lease unto the said parties of the second part their heirs or assigns, the following described tract or parcel of land, situate in the County of Ottawa and more particularly described as follows, viz:

> The East half (E2) of the Northwest Quarter (NW4): The west half of the Northeast Quarter (W2 of NE4) the Southeast Quarter of the Northeast Quarter (SE4 of NE4) of Section Thirty-two (32) Township Twenty-nine (29) Range Twenty-three (23)

east of the Indian Meridian, County of Ottawa, State of Oklahoma, containing 200 acres more or less, for the term or period beginning at the date hereof, and ending at midnight, on the first day of November, A. D. 1922, upon the following terms and conditions, to-wit:

The said parties of the second part, their heirs or assigns, shall immediately commence the work of mining said land in good faith; shall place and have on said land sufficient pumps and machinery to drain the same of water, so as to permit the efficient mining thereof, and shall properly operate the same and shall increase the capacity thereof from time to time as the same may become necessary.

Parties of the second part their heirs or assigns, further covenant and agree to erect or build one or more modern mills or such other crushing, cleaning, reduction or concentration works or plants as may be necessary to put in marketable condition the ores and minerals mined or raised on this land, and to sink a sufficient number of shafts, and operate the same, so as to keep said mill or mills or other concentration works in operation, at least up to the standard.

The said parties of the second part, their heirs or assigns, shall mine said land in a good and workmanlike way and manner, and shall keep all shafts and drifts well and securely cribbed, timbered and supported, and shall not remove the said cribbing, timbers or supports, so as to endanger the ground or permit the same to cave in or fall in.

Mining shall be carried on in good faith continuously, and shall not be suspended at any time to exceed ten days in any

one month, without the written permission of the party of the first part, or his agent. Delays caused by unavoidable accident, or causes beyond the control of parties of the second part, alone excepted.

Pillars shall be left in said mine or mines, when and wherever necessary to prevent the roof from falling or the said mines from caving or falling in, and shall not be removed except on written permission of the said party of the first part, or his agent.

Party of the first part, or his agent, shall have at all times the right to inspect any and all mines, shafts, drifts or workings in and upon said land, and may use the machinery of parties of the second part for that purpose.

All ores or minerals mined or raised on said land shall be cleaned and prepared for market on said land, and no rough or crush stuff shall be removed therefrom to be cleaned. Nor shall any ore, mineral or crush stuff from other land be brought or cleaned on said land, without the written permission of the party of the first part, or his agent.

It is further agreed between the parties hereto that after ore has been discovered in apparently paying quantities and a shaft started that each forty acres thus affected shall immediately become a separate proposition and shall operate thereafter as a separate lease.

All tailings produced from the mill or mills on this ground during the term of this contract shall be the property of the first party after the first milling of the ore dirt and the first party may enter said premises and remove same at will.

The said parties of the second part, their heirs or assigns, shall keep a correct account of all minerals mined, the kind and the weights thereof, to whom sold, and the price received therefor, which books and accounts shall be open to the inspection of the said party of the first part, or his agent, at all reasonable times.

Any or all ores or other minerals sold from this land shall be weighed over scales of party of the first part.

All checks, drafts, cash, or other credits for ores or other minerals sold from this land shall be made payable to the order of party of the first part, or his duly authorized agent, who shall at once, on the receipt thereof (and collections duly made on said checks and other credits) returned to the parties of the second part (85) Eightyfive per cent thereof, and retain the remaining (15) Fifteen per cent as his rent, or royalty, due at each sale or turn-in of ores or minerals: provided, how-

ever, the said party of the first part reserve the right and privilege at all times to take said ores or other minerals, or any part thereof, paying the market price therefor, less the above named (15) Fifteen per cent royalty.

The said parties of the second part, their heirs or assigns, shall have the right to erect all necessary buildings and machinery, on said land for the purpose of mining, dressing, crushing and cleaning ores and minerals thereon, and to remove the same at the expiration or forfeiture of this lease, except timbering and other improvements necessary to support the ground.

No wording or sentence in this lease shall be construed as to permit parties of the second part, or others, to move on, erect or build habitations or dwelling houses on said land, or to conduct other business on said, other than for mining, crushing, cleaning and handling ores and minerals, as contemplated in this lease, without the written permission of party of the first part, or his agent.

All uses of this land not consistent with the proper mining, milling or handling of ores and minerals, as herein required, and all surplus water not necessary or required by parties of the second part, are hereby reserved to the party of the first part.

In the event that the said second part- their heirs or assigns, shall fail to fulfill and comply with any of the terms and conditions of this lease. this lease shall thereby become forfeited and terminated, and the said party of the first part may thereupon at once taken possession of said land without notice to quit, demand of possession, or any legal proceeding whatever

Subject to the above and foregoing terms, conditions and considerations this lease shall remain in force from the date thereof, and until midnight on the 1st day of November, A. D. 1922.

In witness whereof, we have hereunto set our hands and seals the day and year first above written (to duplicate copies thereof)

W. M. Smith
L. C. Church,
J. S. Mabon.

Witnesses to signatures: .....

State of Oklahoma, Ottawa County—ss.

Before me, J. L. Speer, a Notary Public, in and for said

County and State, on this 21st day of June, 1915, personally appeared J. S. Mabon to me known to be the identical person who *who* executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed.

In Witness Whereof I have hereunto set my hand and seal the day and year last above written.

(Seal) J. L. Speer, Notary Public.

My commission expires June 2, 1917.

State of Oklahoma, County of Ottawa, ss.

Before me, A. S. Thompson, a Notary Public in and for said County and State, on this 14th day of July, 1915, personally appeared W. M. Smith and L. C. Church, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and seal the day and year last above written.

(Seal) A. S. Thompson, Notary Public.

My commission expires June 15, 1919.

Filed for record July 17th, 1915, 8-A.M. Recorded in Book 44, at page 181. W. P. McCullough, County Clerk. Mailed to Picher Lead Co., Joplin, (Draft.)

CERTIFICATE OF TRUE COPY.

State of Oklahoma, County of Ottawa—ss.
To All to Whom This May Concern:

I, J. C. Briggs, County Clerk, within and for the above County and State, does hereby certify that the attached and foregoing is a true and correct copy of a certain instrument that is of record in this office, same being recorded in Book 44 at page 181, and I so certify.

Witness my hand and official seal this 2nd day of April, A. D. 1919.

(Seal) (Signed) J C Briggs County Clerk.

Defendant's Exhibit #6.

(Defendant's Exhibit No. 6 is a large blue print showing the Fish lease and also containing tabulations showing the

number of wells, footage and cost on various portions of the lease.)

[CLERK'S NOTE: Above exhibit not filed with Statement ment of the Evidence.]

Defendant's Exhibit #7.

Fish Land No. 4—No. 24

0-11 Clay
11-30 lime boulders
30-105 " & flint
105-112 white "
112-130 blue "
130-150 white & blue flint
Lost hole. Water at 112' Drilled by Eubanks.

Defendant's Exhibit #8.

Fish Land No. 5—No. 27

0-5 Clay
5-25 sand spar
25-120 white & blue flint
120-155 brown flint & lime
155-180 white " "
180-265 Blue & white flint, some lime
Drilled by Burdick Completed 9-18-14.

Defendant's Exhibit #9.

Fish Lease No. 6

0-30 surface
30-35 shale
35-45 lime
45-60 " lead shines
60-65 tar
65-80 lime & flint
80-85 tar & flint
85-170 flint
170-210 water flint
Drilled by Sexson & Haney Rig 1 started Oct 26th
Completed Nov. 16th 1914 17-1/2' casing Water 40'

Defendant's Exhibit #10.

Fish Land No. 7

0-9 clay
9-15 lime & sand
15-20 " "
20-30 flint & lime
30-40 lime spar lead shines
40-45 flint boulders & lime
45-50 gray lime
50-65 flint & lime
65-70 " " tar
70-75 " "
75-85 " " tar
85-90 " "
90-95 wh. flint
95-100 water opening
100-105 lime & flint boulders.

Drilled by Haney. Started Nov. 16-1914 Completed Dec. 3 Abandoned 20' 4-1/4 casing lost in hole.

12' 5-5/8 casing and 90' 4-1/4" casing used.

Defendant's Exhibit #11.

Fish Land No. 8—No. 55

0-10 surface clay
10-50 Lime
50-60 " & flint
60-95 Flint
95-115 " L & J. shines
115-135 "
135-152.5 " good jack
152.5-200 flint
200-226 " & lime

Drilled by Haney to 149 ft.

Drilled by Baugh to 226 ft.

Haney started Dec. 4, quit Dec. 24

Baugh started Dec. 26 completed Jan 14

Assay 135-152.5 Zu S 5.0%

Water stands at 70 ft.

9' 5-5/8" casing and 135' 4-1/4" casing used.

Defendant's Exhibit #12.

Fish Land No. 9—Hole No 64

0-17 Clay
17-45 lime boulders & yel. clay
45-100 Brown lime
100-120 shelly flint
120-165 flint
165-175 " jack shines
175-190 " fair jack
190-199 white flint jack shines

Assay 175-190 Zu S 6.34%
Drilled by Baugh Rig #2
Started Jan. 20 Completed Feb 13-15
12′ casing
Struck water at 100′

Defendant's Exhibit #13.

Fish Land No. 10—Hole No. 67

0-17 Clay & sand boulders
17-38 Lime boulders
38-40 Soap
40-75 Lime
75-95 " & flint
95-140 flint
140-161 " & lime
161-180 " jack shines
180-200 " Good "
200-205 Br. flint good jack
205-212 water flint

Drilled by Baugh Rig #2 Started 2-15-15
Completed 3-2-15 Struck water at 85′ 12′ 5-5/8″
Casing Assay 180-205 5.17% Zu S.

Defendant's Exhibit #14.

Fish Land No. 11—Hole No. 72

0-15 Clay
15-90 Lime
90-184 Flint
184-185 Shale
185-200 Flint Thin jack shines

Drilled by J. D. Baugh
Started 3-6-15 Completed 3-17-15
20′ 5-5/8″ casing

Defendant's Exhibit #15.

Fish Lease No. 12—Drill Hole No. 80.

0-25 Clay & sand boulders
25-30 Lime & sand
30-95 "
95-120 " & flint
120-132.5 flint & lime
132.5-135 " jack shines
135-160 "
160-162 " jack shines
162-164 "
164-175 " extra good jack
175-177.5 black flint extra good jack
177.5-180 Flint " " "
180-185 " Jack shines
185-204 white water flint

Drilled by F. M. Sexon. Started 3-25-15
Completed 4-13-15. Water Stands at 80'
16' 5-5/8" casing
Assay 164-182.5 8.33% Zu S 9.80% Zu S.

Defendant's Exhibit #16.

Fish Lease No. 13—Hole No. 87.

0-16 Clay & boulders
16-30 white lime
30-50 Lime & sand
50-85 "
85-115 " & flint
115-125 flint J & L shines
125-162.5 "
162.5-165 black chatty flint good jack
165-181.5 Flint " "
181.5-184 white water flint

Drilled by F. M. Sexson Started 4-14-15 Completed 4-24-15 Struck water at 125' stands at 80'
16' 5-5/8" casing Assay 162.5-181.5 7.38% Zu S.

Defendant's Exhibit #17.

Fish Lease No. 14—Hole No. 90.

0-15 Clay
15-36 sand
36-55 lime & sand
55-80 " & soap

80-120 "
120-160 " & flint
160-180 flint jack shines

Abandoned steel in hole Drilled by J D Baugh Started 3-18-15 Quit 4-28-15 15' 5-5/8" casing 1008 4-1/4" casing Water stands at 85'

Defendant's Exhibit #18.

Fish Lease No. 15—Hole No. 96.

0-13 Clay
13-40 lime & spar
40-95 lime & some flint
95-115 flint & some lime
115-120 " jack shines
120-150 "
150-155 " jack shines
155-172 " extra good jack
172-175 black chatty flint good jack
175-180 " & white flint jack shines
180-185 white water flint

Assay 155-172 Zu S 49.83% Water stands at 82'
Drilled by Sexson Started 4-25-15
Completed 5-5-15

Defendant's Exhibit #19.

Fish Lease No. 16—Hole No. 103

0-12 Clay
12-35 sand & lime
35-75 lime
75-150 flint
150-154 " rich jack
154-158 Opening
158-167.5 flint rich jack
167.5-170 black flint rich jack
170-175 white shelly flint
175-181 clear lead water flint

Assay 150-170 Zu S 37.67%
Drilled by F. M. Sexson Started 5-5-15 Completed 5-15-15 Water stands at 82 ft.

Defendant's Exhibit #20.

Fish Lease No. 17—Hole No. 105.

0.35 Clay
35-50 sand & soap
50-90 lime & "
90-140 " flint shale & mundic
140-160 " " "
160-165 " "
165-190 flint & spar jack shines
190-195 " & spar good jack
195-208 flint (white)

Assay 190-195 Zu S 5.90%
Drilled by J. D. Baugh Rig #2
Started 4-29-15 Completed 5-18-15
Water stands at 74'

Defendant's Exhibit #21.

Fish Lease No. 18—Hole No. 110

0-13 Clay
13-75 lime
75-142.5 flint
132.5-140 " good lead & jack shines
140-155 "
155-165 " rich jack
165-170 black flint rich jack
170-175 white water flint jack shines

Assay 155-170 Zu S 21% Drilled by F. M. Sexson
Started 5-19-15 Completed 6-1-15
Water stands at 82'

Defendant's Exhibit #22.

Fish Lease No. 19—Hole No. 111

0-30 Clay
30-110 lime
110-170 flint
170-175 " jack shines
175-180 " fair jack
180-185 " jack shines
185-193 white water flint

Assay 175-180 Zu S
Water stands at 69'
Drilled by J. D. Baugh Rig No. 2
Started 5-19-15 Completed 6-2-15

Defendant's Exhibit #23.

Fish Lease No. 20—Hole No. 121.

0-13 clay
13-60 lime
60-115 " & flint
115-154 flint
154-167.5 black & white flint good jack
167.5-170 white water flint

Assay 154-167.5 Su S 11.25%
Drilled by F. M. Sexson.
Started 6-2-15 Completed 6-8-15
Water struck at 120′ raised to 80′

Defendant's Exhibit #24.

Fish Lease No. 21—Hole No. 122.

0-10 clay
10-65 lime
65-90 " & flint
90-120 flint (hogchaw)
120-156 "
156-161 " (hog chaw)

Drilled by J. D. Baugh Rig #2
Started 6-3-15 Completed 6-18-15
Water stands at 80′

Defendant's Exhibit #25.

Fish Lease No. 22—Hole No. 125.

0-4 Clay
4-60 lime
60-100 " & flint
100-120 flint jack shines
120-190 "
190-247 " & lime

Drilled by Baker & Sons
Started 6-2-15 Completed 6-26-15
Water stands at 100′ Raised to 60′

Defendant's Exhibit #26.

Fish Lease No. 23—Hole No. 126.

0-15 Clay
15-75 lime
75-100 " & flint

100-125 flint
125-140 " jack shines
140-155 " (hog chaw)
155-165 black chatty flint jack shines
165-175 " " " good jack shines

Assay 165-175 Zu S 3.12%
Drilled by Sexson
Started 6-22-15 Completed 7-1-15

Defendant's Exhibit #27.

Fish Lease No. 24—Hole No. 127

0-15 Clay
15-70 lime
70-105 " & flint
105-125 flint
125-140 " lead & jack shines
140-160 " (hog chaw)
160-172.5 " jack shines
172.5-180 white water flint

Drilled by Thomas Rig #2
Started 6-22-15 Completed 7-1-15
Water stands at 80′

Defendant's Exhibit #28.

Fish Lease No. 25—Hole No. 130

0-15 Clay
15-90 Lime
90-175 Flint
175-208 " good jack S C fair lead shines

Drilled by J. P. Baker & Sons (Houston driller)
Started 6-28-15 Completed 7-8-15

Defendant's Exhibit #29.

Fish Lease No. 26—Hole No. 132.

0-16 Clay
16-75 lime
75-90 " & flint
90-170 flint
170-203 while water flint

Drilled by W. M. Thomas Rig #2
Started 7-5-15 Completed 7-19-15

Defendant's Exhibit #30.

Fish I ease No. 27—Hole No. 133

0-10 Clay
10-50 lime
50-100 " & flint
100-105 flint
105-145 blue flint jack shines
145-199 flint

Drilled by F. M. Sexson Started 7-6-15
Completed 7-19-15

Defendant's Exhibit #31.

Fish Lease No. 28—Hole No. 138

0-15 Clay
15-60 lime
60-110 " & flint
110-125 flint
125-170 yellow flint

Drilled by J. H. Burdick Rig #4
Started 5-5-15 Completed Aug 2-15

Defendant's Exhibit #32.

ASSIGNMENT OF INTEREST IN LEASE.

Know All Men by These Presents:

That I, Dallas Hopper, lessee in a certain mining lease dated the 29th day of April 1912, given by Leander J. Fish as lessor, leasing the following described lands, to-wit:

The East Half of the Northwest quarter and the South east quarter of the Northeast Quarter of Section Thirty two in Township Twenty-nine, Range Twenty three East, in Ottawa County, Oklahoma, said lease being recorded on

the 29th day of April, 1912, in Book 31, at page 167, in the office of the recorder of deeds of Ottawa County, Oklahoma, for and in consideration of the sum of One Dollar in hand paid to me by J. P. McNaughton, and Ray McNaughton, the receipt hereof is hereby acknowledged, at and before the signing of the assignment, have *hr*anted, assigned and set over, and I do hereby assign and set over to the said J. P. McNaughton and Ray McNaughton, an undivided two-thirds interest in and to all the interests and rights which have or may accrue by virtue of the above described lease.

It Witness Whereof I have hereunto set my hand this 11th day of March 1915

Dallas Hopper.

State of Oklahoma, County of Ottawa—ss.

Before me, Vern E. Thompson, County Judge of Ottawa County, State of Oklahoma, on this 11th day of March, 1915, personally appeared Dallas Hopper, to me well known to be the identical person who executed the above and foregoing instrument, and acknowledged to me that *she* executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal this 11th day of March, 1915.

Vern E. Thompson,

(Seal) County Judge of Ottawa County, Oklahoma.

State of Oklahoma, County of Ottawa—ss. This instrument filed for record March 11th, 1915, 8 A. M. Recorded in Book 42, page 325 W. P. McCullough, County Clerk.

CERTIFICATE.

State of Oklahoma, County of Ottawa—ss.

The undersigned does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 42 at page 325, which was duly recorded in this office.

In Witness Whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

J. A. Walker, Co. Clerk,

By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #33.

ASSIGNMENT OF INTEREST.

Know All Men by These Presents:

That I, W. P. McCullough, assignee in a certain Mining Lease dated the 29th day of April, 1912, and recorded on the 29th day of April, 1912, in Book 31, at page 167, in the office of Register of Deeds (now office of the County Clerk), at Miami, Ottawa County, Oklahoma, covering the following lands, to-wit:

The East Half (E2) of the North-west Quarter (NW4) and the South-east Quarter (SE4) of the North-east Quarter (NE4) of Section Thirty-two (32), Township Twenty-nine (29), North, Range Twenty-three (23), East of the Indian Meridian, in Ottawa County, State of Oklahoma,

For and in consideration of the sum of One ($1.00) Dollars, and other valuable considerations, to me in hand paid by B. E. Beth, do hereby grant, bargain, assign, set-over and convey unto the said B. E. Beth a one-eighth (1/8) undivided interest in and to the above lease, or which may accrue by virtue of said above lease.

In Witness Whereof I have hereunto set my hand this 20th day of May A. D. 1915.

W. P. McCullough.

State of Oklahoma, County of Ottawa—ss.

Before me, Geo. C. Brown, a Court Clerk, in and for Ottawa County, State of Oklahoma, on this 20th day of May A D 1915, personally appeared W. P. McCullough, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal this 20th day of May, A D 1915.

(Seal) Geo C Brown,
Court Clerk, in and for Ottawa county, Oklahoma.

Filed for Record May 20th, 1915, at 1 P. M. and recorded in Book 42, at page 746. W. P. McCullough, County Clerk. 42/746

State of Oklahoma, County of Ottawa—ss.

The undersigned, does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 42 at page 746, which was duly recorded in this office.

In Witness Whereof I have hereunto set my hand and seal of this office this 13 day of November, 1917.

J. A. Walker, Co. Clerk

(Seal) By (Signed) J. C. Briggs Deputy

Defendants' Exhibit #34.

ASSIGNMENT.

State of Oklahoma, County of Ottawa, ss.

This instrument made this the 7th day of June, 1916, by and between W. P. McCullough, party of the first part, and A. C. Towne and Paul A. Ewert, parties of the second part.

For and in consideration of One Dollars ($1.00) to him in hand paid the receipt of which is hereby acknowledged, said party of the first part hereby sell, assigns, transfers and conveys to said parties of the second part, their heirs and assigns, an undivided two-fifths (2/5) of twenty-seven thirty-seconds (27/32) interest in and to a business, oil and mining lease, on the following described land:

> The East Half (E2) of the Northwest Quarter (NW4) and the Southeast Quarter (SE4) of the Northeast Quarter (NE4) of Section Thirty-two (32), Township Twenty-nine (29) Range Twenty-three (23) East in Ottawa County, containing one hundred and twenty (120) acres.

Said lease having been made on the 2nd day of April, 1912, by Leander J. Fish to Dallas Hopper, recorded in the office of the Register of Deeds of Ottawa County, Oklahoma, in Book Thirty-one (31) on page one hundred and sixty-seven (167), on April 29th, 1912, and assigned to party of the first part and others.

In witness whereof, party of the first part has hereunto set his hand and seal the day and year above written.

W. P. McCullough (Seal)

State of Oklahoma, County of Ottawa, ss.

Before me, D. L. Towne, a notary public, within and for said county and state, on this 7th day of June, 1916, personally appeared W. P. McCullough, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth.

(Seal) D. L. Towne, Notary Public.

My commission expires Mar. 13, 1920.

Filed for record July 14th, 1916. 1 P. M. W. P. McCullough, County Clerk. (Mailed to D. L. Towne, City) 49/230

State of Oklahoma, County of Ottawa, ss.

The undersigned does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 49, page 230, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal) J. A. Walker, Co. Clerk,

By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #35.

ASSIGNMENT.

State of Oklahoma, County of Ottawa, ss.

This Instrument, made this 9th day of June, 1916, by and between A. C. Towne, party of the first part, and J. C. Jacobs, party of the second part.

For in consideration of One Dollar ($1.00) to him in hand paid the receipt of which is hereby acknowledged, said party of the first part hereby sells, assigns, transfers and conveys to said party of the second part, his heirs and assigns, an undivided one-half of one-fifth interest in and to a business, oil and mining lease, on the following described land:

The East Half (E2) of the Northwest Quarter (NW4) and the Southeast Quarter (SE4) of the Northeast Quarter (NE4) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23) East, in Ottawa County, Oklahoma, containing one hundred and twenty (120) acres.

Said lease having been made on the 2nd day of April, 1912, by Leander J. Fish, to Dallas Hopper, recorded in the office of the Register of Deeds of Ottawa County, Oklahoma, in Book thirty-one (31), on page one hundred and sixty-seven (167), on April 29th, 1912, and assigned to party of the first part and others.

In witness whereof, party of the first part has hereunto set his hand and seal the day and year above written.

A. C. Towne (Seal)

State of Oklahoma, County of Ottawa, ss.

Before me, D. L. Towne, a notary public, within and for said county and state, on this 9th day of June, 1916, personally appeared A. C. Towne, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth. (Seal) D. L. Towne, Notary Public.

My commission expires Mar 13, 1920.

Filed for record October 9th, 1916. 9 A. M. W. P. McCullough, County Clerk. (Mailed to Grantee, City) 50-70.

State of Oklahoma, County of Ottawa, ss.

The undersigned, does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 50, at page 70, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal) J. A. Walker, Co. Clerk,

By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #36.

ASSIGNMENT OF INTEREST IN MINING LEASE.

Know All Men by These Presents:

That I, W. P. McCullough, party of the first part, for and in consideration of the sum of One Dollar and other valuable consideration, the receipt whereof is hereby acknowledged, to me paid in hand by Frank Gaines, party of the second part, at and before the granting of this assignment, have granted, assigned, conveyed and set over to the said Frank Gaines, his heirs and assigns, the undivided Three Sixteenths (3/16) interest in and to a certain mining lease; bearing date of April 20th, 1912, said mining lease having been given to one Dallas Hopper by Leander J. Fish, and described as follows, to-wit:

East Half of North West Quarter, and South East Quarter of North East Quarter, Section Thirty-two, Township Twenty-nine, Range Twenty-three East of the Indian Meridian, in Ottawa County, Oklahoma, containing one hundred twenty acres more or less.

Also

The undivided one-sixteenth (1/16) interest in and to a certain verbal mining lease from Jas. Pottorff, to T. L. Robinson et al., upon

The West Half of the North East Quarter of Section Thirty-two, Township Twenty-nine, Range Twenty-three East of the Indian Meridian.

The said Frank Gaines, his heirs and assigns, to have and to hold the same for the terms as set out in each contract.

In witness whereof, I have hereunto set my hand and seal this 14th day of April, 1917.

W. P. McCullough.

State of Oklahoma, County of Ottawa, ss.

Before me, Jas. W. Elliott, a notary public, within and for said county and state, personally appeared W. P. McCullough, to me well known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and official seal this 14th day of April, 1917.

(Seal) Has. W. Elliott, Notary Public.

My commission expires Feby. 24th, 1919

Filed for record April 16th, 1917, 8 A. M. J. A. Walker, County Clerk. (Mailed to Grantee, Fairland.) 56/19

State of Oklahoma, County of Ottawa, ss.

The undersigned does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 56, at page 19, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal) J. A. Walker, Co. Clerk.

By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #37.

ASSIGNMENT OF INTEREST IN MINING LEASE.

Know All Men by These Presents:

That I, W. P. McCullough, for and in consideration of the sum of One Dollar, and other valuable considerations, the receipt whereof is hereby acknowledged, to me paid on the 1st day of November, 1916, by E. M. Landrum, do hereby assign, set over and convey to the said E. M. Landrum, his heirs, and assigns, an undivided one-eighth interest in and to the undivided 81/160th interest in and to a certain mining lease dated April 29th, 1912, given by Leander J. Fish to Dallas Hopper, upon

East Half of North West One Fourth, and South East One Fourth of North East One Fourth, in Section 32, Township 29, Range 23 East of the Indian Meridian,

and

The undivided one-eighth interest in and to a certain mining lease upon lots number 5 and 6 and the South East one fourth of the North West one fourth of Section 6, Township 28, Range 24 East of the Indian Meridian, dated July 22nd, 1915

The said E. M. Landrum to have and to hold the same unto himself, his heirs and assigns, *his heirs and assigns*, for the term as set out in each lease or contract.

W. P. McCullough.

State of Oklahoma, County of Ottawa, ss.

Before me, Geo. C. Brown, a Court Clerk, in and for Ottawa County, Oklahoma, personally appeared W. P. McCullough, to me well known to be the identical person who executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth. This 24 day of November, 1916.

Geo. C. Brown, Court Clerk.

Filed for record December 9th, 1916, 8 A. M. (Court seal.) W. P. McCullough, County Clerk. (Mailed to Landrum, City.) 50/425

State of Oklahoma, County of Ottawa, ss.

The undersigned, does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 50, at page 425, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal) J. A. Walker, Co. Clerk.

By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #38.

ASSIGNMENT OF INTEREST IN MINING LEASE.

Know All Men by These Presents:

That I, W. P. McCulloubh, part.. of the first part, for and in consideration of the sum of One (1.00) Dollar, cash in hand paid, the receipt whereof is hereby acknowledged, to me paid by Mollie J. McCullough, party of the second part, at and before the signing of this assignment, have granted, assigned and set over to the said Mollie J. McCullough, her heirs and assigns, the undivided one fourth (¼) interest in and to a certain mining lease bearing date of April 20th, 1912, said lease having been given by one Leander J. Fish, to Dallas Hopper, and described as follows, to-wit:

East Half (E2) of North West (NW4) Quarter, and South East (SE4) Quarter of North East Quarter (NE4) of Section Thirty-two (32) Township Twenty-nine (29) Range Twenty-three (23) East, in Ottawa County, Oklahoma.

The said Mollie J. McCullough, her heirs and assigns to have and to hold the same for the term set out in the original lease.

In witness whereof, I have hereunto set my hand and seal this 19th day of January, 1917.

W. P. McCullough.

State of Oklahoma, County of Ottawa, ss.

Before me, Has. W. Elliott, a notary public within and for said county and state, personally appeared W. P. McCullough, to me well known to be the identical person who executed the foregoing instrument, as his free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and official seal this 19th day of January, 1917.

(Seal) Jas. W. Elliott, Notary Public.

My commission expires Feby 24th, 1919.

Filed for record January 22nd, 1917, 8 A. M. J. A. Walker, County Clerk (Mailed to McCullough, Fairland.) 51/20

State of Oklahoma, County of Ottawa, ss.

The undersigned does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 51, at page 20, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal) J. A. Walker, Co. Clerk,

By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #39.

ASSIGNMENT OF INTEREST IN MINING LEASE.

Know All Men by These Presents:

That I, W. P. McCullough, for and in consideration of the sum of One Dollar and other valuable consideration; the receipt whereof is hereby acknowledged, to me paid on this 7th day of July, 1916, by Peter McCullough, do hereby assign, set over and convey, to the said Peter McCullough, his heirs and assigns, an undivided one-fourth interest in and to the undivided 81/160 interest in and to a certain mining lease dated April 29th, 1912, given by Leander J. Fish, upon the

East Half of the North West Quarter and South East Quarter of North East Quarter, in Section 32, Township 29, Range 23 East of the Indian Meridian.

Said lease being recorded on the 29th day of April, 1912, in Book 31, at page 167, in the office of the Register of Deeds of Ottawa County, Oklahoma

The said Peter McCullough to have and to hold the same to himself his heirs and assigns for the term as set out in said lease. W. P. McCullough.

State of Oklahoma, County of Ottawa, ss.

Before me, Geo. C. Brown, a Court Clerk in and for said county and state, personally appeared W. P. McCullough, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and seal this 7th day of July, 1916.

(Seal) Geo. C. Brown, Court Clerk.

Filed for record July 8th, 1916-8 A. M. W. P. McCullough, County Clerk.

State of Oklahoma, County of Ottawa, ss.

The undersigned does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 49, page 196, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal)

J. A. Walker, Co. Clerk,
By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #40.

ASSIGNMENT OF INTEREST IN MINING LEASE.

Know All Men by These Presents:

That I, W. P. McCullough, for and in consideration of the sum of One Dollar and other valuable consideration; the receipt whereof is hereby acknowledged to me paid on this 7th day of July, 1916, by Theressa McClelland, do hereby assign, set over and convey to the said Theressa McClelland, her heirs and assigns, an undivided one-eighth interest in and to the undivided 81/160th interest in and to a certain mining lease dated April 29th, 1912, given by Leander J. Fish upon the

East Half of NW Quarter and SE4 of NE4 Section 32, Township 29, Range 23 East of the Indian [], said lease being recorded on the 29th day of April, 1912.

In Book 31, at page 167, in the office of the Register of Deeds of Ottawa County, Oklahoma.

The said Theressa McClealland to have and to hold the same to herself her heirs and assigns for the terms as set out in said lease.

W. P. McCullough.

State of Oklahoma, County of Ottawa, ss.

Before me, Geo. C. Brown, a Court Clerk in and for the within county and state, personally appeared W. P. McCullough, to me well known to be the identical person who executed the foregoing instrument and acknowledged to me that executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and seal this 7th day of July, 1916.

(Seal) Geo. C. Brown, Court Clerk.

Filed for record January 5th, 1917. 8 A. M. W. P. McCullough, County Clerk. (Mailed to Grantee, Oklahoma City, 408 W. 9.) 50/586

State of Oklahoma, County of Ottawa, ss.

The undersigned does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 50, at page 586, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal) J. A. Walker, Co. Clerk,

By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #41.

ASSIGNMENT OF INTEREST OF LEASE.

Know All Men by These Presents:

That I, Dallas Hopper, lessee in a certain mining lease dated the 29th day of April, 1912, given by Leander J. Fish, as lessor, leasing the following described lands, to-wit:

> The North East Quarter (NE4) of the Northwest Quarter (NW4) of Section thirty-two (32), Township twenty-nine (29) North, Range twenty-three (23) East, in Ottawa County, Oklahoma,

said lease being recorded on the 29th day of April, 1912, in Book 31, at page 167, in the office of the Register of Deeds of Ottawa County, Oklahoma, for and in consideration of the sum of One Dollar in hand paid to me by Curt Williams, the receipt whereof is hereby acknowledged at and before the signing of this assignment, have granted, assigned and set over, and I do hereby assign and set over to the said Curt Williams, an undivided thirty-sixth (36th) interest in and to all the interests and rights which have or may accure by virtue of the above described lease.

In witness whereof, I have hereunto set my hand this 17th day of May, 1915. Dallas Hopper.

State of Oklahoma, County of Ottawa, ss.

Before me, R. J. Tuthill, a notary public of Ottawa County, State of Oklahoma, on this 19th day of May, 1915, personally appeared Dallas Hopper, to me well known to be the identical person who executed the above and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal this the 19th day of May, 1915,

(Seal)

R. J. Tuthill,
Notary Public of Ottawa County,
State of Oklahoma.

My commission expires Feb. 25, 1917.

Filed for record June 2, 1915, 8 A. M. Mailed grantee, city (Book 42, page 803.) 42/803

State of Oklahoma, County of Ottawa, ss.

The undersigned does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 42, page 803, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal)

J. A. Walker, Co. Clerk,
By (Signed) J. C. Briggs.

Defendant's Exhibit #42.

ASSIGNMENT OF MINING LEASE.

Know All Men by These Presents:

That I. Dallas Hopper, lessee in a certain mining lease, dated the 29th day of April, 1912, given by Leander J. Fish, as lessor, leasing the following described lands, to-wit:

The East Half of the North West Quarter, and the South East Quarter of the North East Quarter of Section 32, Township 29 North, Range 23 East of the Indian Meridian, in Ottawa County, Oklahoma.

Said lease being recorded on the 29th day of April, 1912,

in Book 31, at page 167, in the office of the Register of Deeds of Ottawa County, Oklahoma.

For and in consideration of the sum of One Dollar ($1.00) and other valuable considerations, to me in hand paid, by James C. Briggs, and W. P. McCullough, the receipt whereof is hereby acknowledged, in and before the signing of this assignments, have granted, assigned, and set over to the said James C. Briggs, and W. P. McCullough, their heirs and assigns, an undivided Two Thirty-sixth (2/36) interest in and to all the interests and rights which I may now have, or may accrue by virtue of the above lease.

In witness whereof, I have hereunto set my hand this 15th day of April, A. D. 1915. Dallas Hopper.

State of Oklahoma, County of Ottawa, ss.

Before me, Geo. C. Brown, Court Clerk, in and for Ottawa County, State of Oklahoma, on this 15th day of April, A. D. 1915, personally appeared Dallas Hopper, to me known to be the identical person who executed *with* within and foregoing instrument, and he acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal this 16th day of April, A. D. 1915.

(Seal) Geo. C. Brown,
Court Clerk in and for
Ottawa County, Oklahoma

State of Oklahoma, County of Ottawa, ss.

This instrument filed for record May 13th, 1915, 8 A. M. Recorded in Book 42 at page 721. W. P. McCullough, County Clerk. 42/721

State of Oklahoma, County of Ottawa, ss.

The undersigned, does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 42 at page 721, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal) J. A. Walker, Co. Clerk,
By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #43.

ASSIGNMENT OF PART INTEREST IN MINING LEASE

For and in consideration of the sum of One Dollar in hand paid by Thomas F. Phillips, of Kingfisher, Oklahoma, I, Dallas Hopper, of Miami, Oklahoma, do hereby sell, transfer, set over and assign unto the said Thomas F. Phillips, his heirs, executors and assigns, an undivided one-thirty-sixth interest in and to one certain mining lease executed by Leander J. Fish to the said Dallas Hopper, covering the following described real estate, to-wit:

> The East Half of the Northwest Quarter and the Southeast Quarter of the Northeast Quarter of Section Thirty-two, Township Twenty-nine, North, Range Twenty-three, East of the Indian Meridian, in Ottawa County, Oklahoma,

said mining lease dated the 29th day of April, 1912, executed by the said Leander J. Fish, filed in the Register of Deeds office on the 29th day of April, 1912, recorded in Book 31, at page 167, Ottawa County, Oklahoma.

In witness whereof, I have hereunto set my hand and seal this 4th day of June, 1912.

Dallas Hopper.

State of Oklahoma, County of Ottawa, ss.

Before me, D. W. Cooter, a notary public, within and for said county and state, on this 4th day of June, 1915, personally appeared Dallas Hopper, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth. (Seal) D. W. Cooter,
Notary Public.

My commission expires January the 5th, 1918.

Filed for record June 17th, 1915, 1 P. M. Recorded in Book 44, at page 41. W. P. McCullough, County Clerk. Mailed to Grantee, Kingfisher, Oklahoma. (Person.) 44/41

State of Oklahoma, County of Ottawa, ss.

The undersigned does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that

the above and foregoing is a true and correct copy of the records, as portrayed in Book 44, at page 41, which was duly recorded in this office.

In witness whereof I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal) J. A. Walker, Co. Clerk,
By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #44.

ASSIGNMENT OF INTEREST IN MINING LEASE.

Dallas Hopper to James C. Briggs.

Know All Men by These Presents:

That I, Dallas Hopper, lessee in a certain mining lease dated the 29th day of April, 1912, given by Leander J. Fish, as lessor, leasing the following described lands, to-wit:

> The East Half of the North West Quarter and the South East Quarter of the North East Quarter, of Section 32, Township 29 North, Range 23 East of the Indian Meridian, in Ottawa County, Oklahoma.

Said lease being recorded on the 29th day of April, 1912, in Book 31 *at page 31,* at page 167, in the office of the Recorder of Deeds of Ottawa County, Oklahoma.

For and in consideration of the sum of One Dollar and other valuable considerations, to me in hand paid, by James C. Briggs, the receipt whereof is hereby acknowledged, in and before the signing of this assignment, have granted, assigned and set over to the said James C. Briggs, his heirs and assigns, an undivided One Twelfth interest in and to all the interests and rights which I may now have, or may accrue by virtue of the above lease.

In witness whereof, I have hereunto set my hand this 10th day of April, A. D. 1915.

Dallas Hopper.

State of Oklahoma, County of Ottawa, ss.

Before me, W. P. McCullough, a County Clerk, in and for Ottawa County, State of Oklahoma, on this 10th day of April, 1915, personally appeared Dallas Hopper, to me well known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and pusposes therein set forth.

Witness my hand and official seal this 10th day of April, 1915. (County Clerk's Seal) *A.* P. McCullough, County Clerk.

Filed for record April 10th, 1915, at 1 o'clock P. M. Recorded in Book 42, at page 578. W. P. McCullough, County Clerk. Mailed to Grantee, City, 4/10/15. 42/578
State of Oklahoma, County of Ottawa, ss.

The undersigned, does hereby certify that he is the duly elected, qualified and acting County Clerk of Ottawa County, Oklahoma; and as such official, has charge and custody of all the real estate records of Ottawa County, Oklahoma, and that the above and foregoing is a true and correct copy of the records, as portrayed in Book 42 at page 578, which was duly recorded in this office.

In witness whereof, I have hereunto set my hand and seal of this office this 13 day of November, 1917.

(Seal) J. A. Walker, Co. Clerk,
By (Signed) J. C. Briggs, Deputy.

Defendant's Exhibit #45.

AMENDMENT TO ANSWER.

Defendant avers that the plaintiffs are now estopped to claim any right to mine the land in controversy under the lease executed by Leander J. Fish, to Dallas Hopper, by reason of the following facts, viz.: that after this suit was begun the plaintiffs W. P. McCullough and E. M. Landrum begun a suit in the District Court of Ottawa County, Oklahoma, wherein these said plaintiffs charged and averred that Leander J. Fish executed to the defendant the lease set out in plaintiff's petition, and the defendant's answer on the 4th day of November, 1912, and set out a copy of said lease; and charged and averred that the said Leander J. Fish and Joseph Fish on the 6th day of January, 1913, executed to the defendant another mining lease on said land, and charged and averred that the defendant held the 200 acres described in the plaintiff's petition and defendant's lease therein and further charged and averred as follows:

That after executing said lease it became necessary to prospect the lands, and in order to get the prospecting done the defendant J. E. Potterf with the knowledge and *acquiescance* of the defendant Smith represented to the plaintiffs and their associates that he held valid sub-leases from the defendant Smith upon the property at ten per cent (10%) royalty

and requested the plaintiffs and other associates with them, to join with him in developing the land and doing the work required of defendant Smith to hold the original lease, and the work required of him and to hold his sub-leases and stated to them that if this was done their interest in this should be in proportion to the amount advanced. That pursuant to said agreement T.L.Robinson, W.P.McCullough, Byron White, E.M. Landrum, Oscar Hadley and E. Stuckey advanced and paid for eight-sixteenths of the amount required to drill four holes on the property. Robinson, paying for 2/16ths; McCullough 1/16th; and Stuckey 1/16th, Byron White and E. M. Landrum 2/16ths, and Oscar Hadley and W. P. McCullough 2/16ths, and all interest of White being purchased by E. M. Landrum, and all interest of Hadley being assigned to W. P. McCullough. That the interests now held by the parties are as follows: T. L. Robinson 2/16ths: W. P. McCullough 3/16ths, E. M. Landrum 2/16; E. Stuckey 1/16th, and the remaining interests were held by the defendant Potterf and his associates. That the management of the drilling was instructed to defendant Potterf. That said Potterf as a result of the drilling discovered that the land contained valuable deposits of Lead and Zinc, and after making the discovery kept the discovery secreted from plaintiffs, but informed defendant Smith of the situation, (that all the work required to keep alive the lease of defendant Smith from the original landlord was done by plaintiff and the parties interested) and defendant Potterf with the knowledge and acquiescence of defendant Smith did the drilling under a representation made to the plaintiff, of being the owner of the sub-lease from Smith and collected the price of the drilling from plaintiffs in the proposition stated.

That after discovering ore in paying quantities existed on the land the defendant Potterf in violation of his duty to the plaintiff, colluded with defendant Smith and the defendant Smith in violation of the rights of the plantiff, granted a lease to the property to the defendant- J. S. Maben and L. C. Church at a 15% royalty, which said lease is as follows: and set out in full a sub lease from defendant to L. C. Church and J. S. Mabon and further charged that: at the time of the making of said lease ore had been discovered upon the land, as a result of the means of the plaintiffs, but no notice was ever given the plaintiffs requiring further development prior to the making of said lease. And the plaintiffs were not advised that further development was required and that defendant Potterf with the knowledge of defendant Smith assured plaintiffs that it was not necessary to do further development in order to hold their interests. That under said last named lease further development has been had and the defendants

Church and Maben have paid to defendants Smith and Potterf a large amount of equity. That in equity and good conscience a 1/3*th* of the royalty paid and to be paid by the defendants Church and Maben belongs to the plaintiffs, namely:

And the said plaintiff in said suit and petition prayed judgment that the defendant be required to account to him for their interest in the royalties accruing from mining operations under the aforesaid lease of Leander J. Fish to this defendant and under the sub-lease by this defendant made to the said Church and Mabon, and which said petition was verified by the plaintiff W. B. McCullough. That said suit was brought to trial by the said plaintiffs and the said plaintiffs testified therein in support of the averments in their said petition, and said case went to judgment thereon and said case was duly appealed to the Supreme Court of the State of Oklahoma by the said plaintiffs, and said cause is now pending in said court; that all the averments in said petition constituting the said plaintiffs' cause of action were inconsistent and contrary to the claims now being made in this cause by said plaintiff.

(Signed) A. Scott Thompson
and
Hiram W. Currey,
Attorneys for Defendant.

(Defendant's Exhibit #46.)

Office of the Clerk of the Supreme Court, Oklahoma City, Oklahoma.

T. L. Robinson et al., Plaintiff- in Error, vs J. E. Potterf et al., Defendant- in Error.

I hereby certify that on the 13" day of December, 1917, there was filed in my office a petition in error and case-made from transcript of the record of the District Court of Ottawa County, cash deposit of $40.00 in the above entitled cause; that said case was duly entered on the docket, numbered 9645, and is pending in the Supreme Court, and that summons in error was issued herein on the .... day of ..... 191.., to .... County.

Witness my hand and the seal of said court, at Oklahoma City, this 13 day of Dec., 1917.

(Seal) William M. Franklin, Clerk,
By (Signed) Jessie Pardu.

Endorsed: No. 1586 Certificate of Appeal Supreme Court of Oklahoma. T. L. Robinson et al. Plaintiff- in Error

vs. J. E. Potterf et al., Defendant- in Error. RB 4, page 559. State of Oklahoma, County of Ottawa, ss. District Court. This instrument was filed for record Dec. 17, 1917. Keil N. Sweeny, Court Clerk. By ....., Deputy.

(Defendants' Exhibit #47.)

In the District Court of Ottawa County, State of Oklahoma.—

T. L. Robinson, W. P. McCullough, E. M. Landrum and E. Stuckey, Plaintiffs, vs. J. E. Potterf, J. S. Maben, L. C. Church, Wesley M. Smith, Defendants.

FINAL DECREE OF THE COURT.

At this, the regular April A. D., 1917 term of this court, begun and holden at the City of Miami, the county seat of Ottawa County, State of Oklahoma, this cause having been regularly set down for trial came on in due course to be heard before the Court and both sides announcing ready for trial, said cause is regularly submitted to the Court, the witnesses on both sides are duly sworn and examined before the Court, and at the conclusion of the taking of the testimony, the Court having heard the law from counsel of record herein representing the respective parties to this law suit, takes the matter under advisement until the 18th day of June, A. D. 1917, the same being one of the day of the regular April A. D. 1917, term of this court, and being an adjourned portion thereof, and the Court having duly and carefully considered both the law and the evidence, and being duly advised in the premises, finds that the plaintiffs have not established the material allegations of their petition herein by a fair preponderance of the evidence, and finds that the defendants have established by sufficient competent evidence the material allegations as contained, alleged, and set forth in their answer herein, and the Court finds from the evidence that the defendant, J. E. Potterf was acting as the agent of the plaintiffs in and about the drilling done by him on the land in question, and that through their said agent, and with knowledge on their part, the plaintiffs abandoned said verbal lease and contract that they had with the said J. E. Potterf, and the Court finds that there was never any privity existing between the plaintiffs on the one hand, and the defendants, J. S. Maben, L. C. Church, and Wesley M. Smith, and the Court finds in the light of all the evidence in the case that the contract of the plaintiffs as to drilling on said land made with the said J. E. Potterf, was not in writing, and was not sufficiently carried out or executed to take the same from under the statute of frauds of our state.

It is therefore ordered, considered, adjudged and decreed by the Court that the plaintiffs take nothing by this their action herein against the defendants, and that the defendants have judgment against the plaintiffs for all of their costs in and about this action laid out and expended, for which let execution issue.

To each finding of fact and to each conclusion of law the plaintiffs, and each of them, except, and the plaintiffs, and each of them, likewise except to the findings of fact as a whole and to the conclusions of law as a whole, and to the judgment and decree of the Court herein as a whole and to each and every part thereof.

(Signed) Preston S. Davis,
Judge of the District Court of
Ottawa County, Oklahoma.

Attest: Karl N. Sweem, Court Clerk, this 18th day of June, A. D. 1917. (Seal)

Endorsed: State of Oklahoma, County of Ottawa, ss. District Court. This instrument was filed for record Jun. 18, 1917. (Signed) Karl N. Sweem, Court Clerk. Civil Journal No. 4, page 497.

In the United States Court for the Eastern District of Oklahoma.—W. P. McCullough et al, Plaintiffs, vs. W. M. Smith et al., Defendants. No. 2305 Equity.

To W. P. McCullough et al., Plaintiffs, and Paul A. Ewert, A. C. Towne and James S. Davenport, their attorneys of record:

You are hereby notified that pursuant to Rule 75 of General Rules of Equity Practice, the defendant W. M. Smith did cause to be lodged with the Clerk of the above styled court at Muskogee, on April 4, 1921, his condensed statement of the evidence adduced at the trial of the above cause, and that he will present same to the Judge of said court, the Honorable R. L. WILLIAMS, for settlement and approval on the 18th day of April, 1921, at ten o'clock A. M., in the Federal Court Building at Muskogee, Oklahoma.

This 7th day of April, 1921.

H. W. CURRY and
A. SCOTT THOMPSON,
Attorneys for W. M. Smith, Defendant.

We, as attorneys of record for plaintiffs in the above styled cause, acknowledge service of the above notice this 7th day of April, 1921.

PAUL A. EWERT,
A. C. TOWNE.
J. S. DAVENPORT,
Attorneys for Plaintiffs.

In the United States District Court for the Eastern District of Oklahoma, No. 2305 Equity.

W. P. McCullough, et al., Plaintiffs, vs. W. M. Smith, Defendant.

ORDER.

Now on this 18th day of April, 1921, the above cause coming on to be heard for the settling and approval of condensed statement heretofore submitted by the defendant, and filed in the office of the Clerk of this court, and it appearing that plaintiffs have filed objections to said condensed statement, and it further appearing that due notice of the hearing of this day has been given by defendant, and all parties being in court this date and agreeing that agreement cannot be reached upon the condensed statement, and that the parties in court this day by their representative counsel agree that the original transcript of the testimony heretofore taken in this cause, and now on file with the Clerk of this court, may be used as the record of the evidence for appeal;

It is therefore ordered by the court that upon said agreement, the original transcript of the testimony taken in this cause now on file with the Clerk of this court shall be the evidence used on appeal, and same being submitted to this court, it is approved and settled as transcript of evidence used in trial court; and it is the further order of the court that such testimony be used on appeal without reducing same to narrative form.

R. L. WILLIAMS, *Judge.*

O. K.—James S. Davenport, one of the Attys. for Plaintiffs.

O. K.—H. W. Curry and A. Scott Thompson, Attys. for Defendant.

Endorsed: Filed Apr. 18, 1921, W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 25th day of April, A. D. 1921, the defendant filed his petition for appeal, together with his assignment of errors, which petition was allowed by the court. Said petition for appeal, order allowing same, and assignment of errors are in words and figures as follows:

Petition for Appeal, and Order Allowing Same.

To the Honorable R. L. WILLIAMS, District Judge of the Eastern District of Oklahoma.

The above named defendant, Wesley M. Smith, feeling himself aggrieved by the decree made and entered into in this cause on the 30th day of October, 1920, does hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

ARTHUR SCOTT THOMPSON,
Attorney for the Petitioner.

The petition for appeal is hereby granted and the appeal allowed upon giving bond, conditioned as required by law, in the sum of $250.00.

R. L. WILLIAMS,
Judge of the United States District Court for the Eastern District of Oklahoma.

Endorsed: Filed Apr. 25, 1921, W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

Assignment of Errors.

And now, on this, the 25th day of April, A. D. 1921, came the defendant, by his solicitor and attorney, Arthur Scott Thompson, and says that the decree entered in the above entitled cause on the 30th day of October, 1920, is erroneous and unjust to this defendant, because:

First:

The trial court committed grievous error in its holding and ruling at the trial of this cause in the following particulars, to-wit: The plaintiffs herein claim and base their suit upon rights which they claim to have acquired as assignees of Dallas Hopper under lease executed by Leander J. Fish, a Quapaw restricted Indian, to said Dallas Hopper, on April 29, 1912, and they ask the court to cancel the leases of defendant herein on the same land, executed to said defendant by said Leander J. Fish on November 4, 1912, and January 6, 1913, respectively, because said leases are void. The appellant herein alleges the following facts: That after this suit was filed herein, and on September 29, 1916, the plaintiffs W. P. McCullough, E. M. Landrum and E. Stuckey, began a suit in the District Court of Ottawa County, Oklahoma, against this appellant and J. E. Pottorff, J. S. Mabon and L. C. Church, charging: That the defendant W. M. Smith held two mining leases executed by Leander J. Fish on the lands involved herein, dated November 4, 1912, and January 6, 1913 (same as sought to be canceled herein and including the lands in the Hopper lease), and in said suit they set out copies of said two leases and further charge that in order that the defendant (appellant herein) might keep his said leases alive it was necessary that same be prospected, and that this appellant W. M. Smith, in the summer of 1913, entered into a contract for a sublease on all of the lands described in the two said leases with one J. E. Pottorff, whereby said J. E. Pottorff was to prospect and mine said land as the sublessee of this appellant, and that they, the said W. P. McCullough, E. M. Landrum and E. Stuckey, entered into a contract with the said J. E. Pottorff whereby they were to take an interest with him in the said sublease, and that in pursuance to said contract of sublease they and the said J. E. Pottorff entered upon said land and prospected same and discovered a large body of lead and zinc ore, and that thereafter the said J. E. Pottorff and this appellant conspired to defeat these plaintiffs, W. P. McCullough, E. M. Landrum and E. Stuckey, and the said W. M. Smith, appellant herein, executed a sublease to L. C. Church and J. S. Mabon on all of the lands described in said two mentioned leases (200 acres), and they charge that they, the said plaintiffs, were in fact the sublessees of this appellant, and that a large amount of ores had been mined on the ground subleased by said L. C. Church and J. S. Mabon, in which they had an interest by reason of said sublease with said J. E. Pottorff under said W. M. Smith, appellant herein, and that a large amount of royalties have been derived from such operations, and they pray that they be given an accounting by rea-

son of said sublease in which they were so interested, and that they be declared partners in said mining upon said land under the mining leases of W. M. Smith, the appellant herein. This appellant further states that thereafter, upon issues being joined in said cause in said state court, the suit was tried and decree entered for the defendants and denying relief to the plaintiffs therein, and the plaintiffs therein prosecuted an appeal to the Supreme Court of Oklahoma, and that said appeal was pending and being prosecuted by said plaintiffs at the time of the trial of this cause herein.

This appellant avers that the trial court herein committed error against this defendant in this cause in that said court ruled and held that the said plaintiffs W. P. McCullough and E. M. Landrum were not bound by the position they took in said cause in said state court as shown by their averments in said cause that they had held and mined this land as the sublessees of this defendant and under the leases of this defendant (appellant herein) dated November 4, 1912, and January 5, 1913, respectively, and that they were not estopped from attacking the leases of this appellant in this cause by reason of such position so taken, and that said court erred in ruling and holding that the fact that said plaintiffs were prosecuting said suit in said state court claiming an interest in mining rights in said land as under-tenants of this defendant, did not mitigate against their rights to claim the mining rights under the aforesaid Dallas Hopper lease.

Second:

The trial court committed grievous error against this appellant in this particular, to-wit: The plaintiffs admitted at the trial that they had taken such position in said state court cause, and the defendant asked leave to file an amendment to his answer charging more in particular the facts concerning said cause in said state court, and this court erred in refusing to permit same to be filed.

Third.

The trial court committed grievous error against this appellant in this, viz:

The plaintiffs admitted at the trial, and introduced evidence with a view to proving that neither they nor their assignees nor the original lessee Dallas Hopper, ever entered upon the leased land for the purpose of prospecting and mining the same in fulfillment of the covenants of the said Dallas Hopper lease under which they claim, at any time from the date of said lease, April 29, 1912, until the 8th day of May,

1913, and claim that they had paid the lessor, Leander J. Fish, the sum of five cents per acre yearly, instead of work, under a clause in the said Dallas Hopper lease, which provides that:

> "The party of the second part hereby agrees to begin operations on the above described premises within 90 days after date of this lease; and in case such operations do not begin within said stated time, said second party agrees to pay to said first part(y) 5c cents per acre, yearly, for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same."

And that they thereby accepted the second alternative set forth in the said stipulation and thereby held as a yearly lease, at a rental of 5c per year per acre from the date thereof, April 29, 1912, to May 8, 1915, and that they regarded said payment as performance, and said plaintiff asked the court to rule and the court did in fact rule and hold that the law declared by this court on a former appeal, in McCullough v. Smith, 243 Fed. 823, permitted the lessee and his assignees to pay five cents per acre yearly under the said stipulation and the same constituted performance of the covenants to prospect and mine the leased land; and that the plaintiff and their assignors did not violate the Indian policy of the United States, nor the leasing act of June 7, 1897, by electing to put in force the alternative of paying five cents per acre instead of mining; and in so holding said land until such time as they might exercise the option of mining and prospecting under the covenants in said lease. And in so ruling and holding the court committed error against the rights of this defendant as the lessee, in possession, of Leander J. Fish, since the law as laid down by this court in said case only went to the extent of holding that the presence of said stipulation did not violate the lease if the lessor immediately on the execution of said lease entered thereunder and prospected and mined according to the working terms and covenants of said lease.

Fourth:

The appellant alleges that the trial court committed grievous error against the rights of this defendant in finding and holding that the said Dallas Hopper lease was not rendered inequitable by reason of the fact that the plaintiffs and their assignors elected to and did exercise the option of paying five cents per acre per year instead of prospecting and mining, and that the facts that said land was held three years under said stipulation did not have the effect to render said stipulation inequitable or unjust; and erred in ruling and holding that a

Quapaw Indian was bound by every stipulation in his lease, and that there need not be an adequate consideration for such stipulation but only a valuable consideration, and that said five cents per acre per year was sufficient to sustain the stipulation in equity.

Fifth:

The record shows that these plaintiffs claim that the lessee, their assignor, paid five cents per acre in lieu of work for one year from the date of the lease and from year to year under the clause in the lease that:

> "The party of the second part hereby agrees to begin operations on the above described premises within 90 days after the date of this lease; and in case such operations do not begin within said stated time, said second party agrees to pay to first part(y) 5c cents per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same."

And the trial court committed error in refusing to hold and rule that under said stipulation the said lessee was required to pay said 5c per acre on or before the end of said 90-day period, from date of the lease, and that the failure of the lessee to either begin operations or pay five cents per acre on or before the expiration of the 90 days specified for the beginning of operations was a breach of the covenants and conditions of the lease, and left the Indian lessor at liberty to lease the said land to other parties.

Sixth:

The plaintiffs claim all their rights under an assignment of interest in the lease of Leander J. Fish to Dallas Hopper, April 29, 1912, which contains the stipulation that:

> "The party of the second part (lessee) hereby agrees to begin operations on the above described premises within 90 days after the date of this lease."

And the trial court erred in refusing to rule that the effect of this stipulation was to render the instrument a mining lease to take effect as a lease in possession 90 days after its date,—a lease in futuro and void under the Quapaw Indian Act of June 7, 1897.

Seventh:

The acts of the plaintiffs in claiming the right to hold the Indian's land for three years by paying five cents per acre

yearly had the effect of putting into force and effect the stipulation in the lease, that,

> "Said second party (lessee) agrees to pay to said first party 5c per acre yearly for each and every acre contained in this lease in lieu of work so long as they or their assigns desire to operate or hold the same."

as a binding contract, optional with the lessee, for a lease in possession,—a contract for a lease in possession at some time in the future to be designated by the lessee by the act of beginning to prospect and mine.

Eighth:

The acts of the plaintiffs in claiming the right to hold the Indian's land by paying five cents per acre yearly, without performing any of the covenants and conditions of the Hopper lease, put into effect the stipulation in said lease that:

> "Said second party (lessee) agrees to pay to said first party (lessor) 5c cents per acre yearly for each and every acre contained in this lease in lieu of work, so long as they or their assigns desire to operate or hold the same,"

and rendered the instrument a periodical contract for a periodical lease, the periods to be one year, and to be at the option, at the beginning of each year to continue said contract for another year, and to be so continued for the full time of ten years, and as such was a *contract for a lease* in possession, and not an executed lease in possession, but to take effect as a lease in possession *at the beginning of any year* the lessee should in fact shift to the first alternative and enter and perform his covenants to prospect and mine, and was a lease in futuro, and the court erred in refusing to so hold and adjudge.

Ninth:

The court erred in finding that the plaintiffs' assignor paid to Leander J. Fish the sum of five cents per acre yearly, —$6.00 per year, for each of the three years during which he held the lands without any effort to mine the same, and erred in finding that such payments were made at or before the beginning of each year, because there is no competent evidence at all in the record to sustain such finding.

Tenth:

The court erred in finding that all of the assignments of interest in the Hopper lease were shown to be in the plaintiffs.

Eleventh:

The court erred in finding and holding that the evidence shows that the plaintiffs are by assignment the owners and holders of the Dallas Hopper lease.

Twelfth:

The court erred in finding and adjudging all the issues in the case for the plaintiff and against the defendant, and in adjudging and decreeing as prayed in the plaintiffs' petition, since the findings and the decree should, under the evidence, have been for the defendant.

Thirteenth:

The Hopper lease is, in fact, a lease in perpetuity, at the election of the lessee or his successors by assignment or otherwise, and as such contravenes and is contrary to the governmental policy toward the Quapaw Indians, and the leasing Act of June 7, 1897, known as the Indian Leasing Act, because the terms of said lease puts it within the power of the white man as a lessee to hold the Indian's land for a full ten years without mining and for speculative purposes, by paying an insignificant sum yearly, and of extending the term beyond ten years, at the option of the lessee, by the payment of practically nothing, and the decree should have been for the defendant.

Fourteenth:

The court erred in failing to find that the plaintiffs had abandoned their lease by failing for more than three years to perform any of the covenants to prospect and mine under said lease.

Fifteenth:

The court erred in permitting the plaintiffs to add additional parties plaintiff after the trial was had.

Wherefore, The defendant prays that the said decree of the District Court be reversed, and that the District Court be ordered to dismiss the plaintiffs' bill, and enter a decree for the defendant quieting his title as against the plaintiffs, and that the court reverse the decree of the trial court and remand the case with such direction to the trial court as this court may deem meet and just in the premises.

ARTUR SCOTT THOMPSON,
Attorney for the Defendant.

Endorsed: Filed, Apr. 25, 1921, W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

And on the same day, to-wit, the 25th of April, A. D. 1921, the defendant filed his bond on appeal, which is in words and figures as follows:

Bond on Appeal.

Know All Men by These Presents:

That we, Wesley M. Smith, as principal, and National Surety Company, as sureties, acknowledge ourselves to be jointly indebted to W. P. McCullough, B. E. Beth, Thomas F. Phillips, Frank Gaines, Theresa McClelland, E. M. Landrum, A. C. Towne, and Paul A. Ewert, appellees in the above cause, in the sum of Two Hundred and Fifty Dollars ($250.00), conditioned that

Whereas, on the 30th day of October, 1920, in the District Court of the United States for the Eastern District of Oklahoma, in a suit depending in that court wherein W. P. McCullough, B. E. Beth, Thomas F. Phillips, Frank Gaines, Theresa McClelland, E. M. Landrum, A. C. Towne and Paul A. Ewert were plaintiffs, and Wesley M. Smith was defendant, numbered on the equity docket as No. 2305, a decree was rendered against the said Wesley M. Smith, and the said Wesley M. Smith having obtained an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree and the citation directed to the said W. P. McCullough, B. E. Beth, Thomas F. Phillips, Frank Gaines, Theresa McClelland, E. M. Landrum, A. C. Towne and Paul A. Ewert, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit, to be holden in the City of St. Louis, in the State of Missouri, on the .... day of June, 1921, next.

Now, if the said Wesley M. Smith shall prosecute his appeal to effect and answer all costs, if he fail to make his plea good, then the obligation to be void, otherwise to remain in full force and virtue.

WESLEY M. SMITH, Principal
National Surety Company, Surety.
(Seal) W. H. Trapp, Atty-in-fact.
A. K. Wilder, Surety.
Atty-in-fact.

Approved this 25th day of April, 1921.

R. L. WILLIAMS,
Judge of the Eastern District of Oklahoma.

Endorsed: Filed Apr. 25, 1921, W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

Citation.

UNITED STATES OF AMERICA, to

W. P. McCullough, B. E. Beth, Thomas F. Phillips, Frank Gaines, Theresa McClelland, F. M. Landrum, A. C. Towne and Paul A. Ewert,

Greeting:

You and each of you are hereby notified that in a certain case in Equity, in the United States District Court in and for the Eastern District of Oklahoma, wherein W. P. McCullough, B. E. Beth, Thomas F. Phillips, Frank Gaines, Theresa McClelland, F. M. Landrum, A. C. Towne and Paul A. Ewert are compalinants, and Wesley M. Smith is defendant, an appeal has been allowed the defendant therein to the United States Circuit Court of Appeals for the Eighth Circuit. You are hereby cited and admonished to be and appear in said court at St. Louis, Missouri, sixty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witnesseth, the Honorable R. L. WILLIAMS, Judge of the United States District Court for the Eastern District of Oklahoma, this the 25th day of April, 1921.

R. L. WILLIAMS,
United States District Judge.

Service of the above citation in error, and receipt of copy thereof, is hereby acknowledged as of this 25 day of April, A. D. 1921.

PAUL A. EWERT,
HENRY LEWIS,
Attorneys for Defendants.

Præcipe for Record on Appeal.

To the Clerk of the United States District Court for the Eastern District of Oklahoma:

The Clerk of the United States District Court for the Eastern District of Oklahoma will please prepare certified copies of the following pleadings, papers, documents and evi-

dence in the above entitled cause, to become the record on appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit, namely:

1. The plaintiff's petition and all the exhibits therein referred to and attached thereto, showing the date of the filing of the same.

2. The defendant's answer to the plaintiff's petition and all exhibits therein referred to and attached thereto, and the defendant's amended answer to said petition.

3. Plaintiff's reply to the defendant's answer.

4. Order permitting the plaintiff to amend his petition by adding additional parties, and the defendant's exception thereto, showing the date of the order and the amendment so filed pursuant to the order, and the defendant's exception thereto.

5. Order submitting the case on trial and the order for arguments and filing briefs.

6. The decree in favor of the plaintiffs.

7. The written objections and exceptions of the defendant to the orders and rulings of the court made in the progress of the trial.

8. All of the evidence, oral and documentary, as contained in the transcript of the evidence made by the court stenographer and as settled and determined by the court and filed with the clerk, together with the order of filing and the date thereof.

9. Decree of the court entered October 30, 1920.

10. The petition for the appeal together with the assignment of errors thereto attached, together with the order of the court allowing the appeal and the date thereof.

11. Bond on appeal and order approving the same.

12. Citation and waiver of service of same by the plaintiffs.

13. Copy of this præcipe.

A. SCOTT THOMPSON, and
HIRAM W. CURREY,
Attorneys for Defendant.

Service of the above præcipe acknowledged this 17 day of May, 1921.

PAUL A. EWERT,
A. C. TOWNE,
Attorneys for Plaintiffs.

Endorsed: Filed May 19, 1921, W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

Præcipe for Additional Matters to Be Incorporated in the Record on Appeal.

To the Clerk of the United States District Court for the Eastern District of Oklahoma:

Plaintiffs request that the clerk of the above named court in the preparation of the record on appeal in the above entitled matter, will in addition to the separate pleadings, papers and documents and evidence requested to be inserted in the record by the said above named defendant, insert therein the following:

1. Plaintiffs' amended petition and all exhibits attached thereto.

2. The opinion of the court filed September 29, 1920, in said above named cause.

3. The application of the several plaintiffs, Ewert, Towne, et al., to be made parties plaintiff in the above entitled suit.

Respectfully submitted,

PAUL A. EWERT,
A. C. TOWNE,
JAMES S. DAVENPORT,
Attorneys for Plaintiffs.

Endorsed: Filed May 24, 1921, W. V. McClure, Clerk U. S. District Court, Eastern District of Oklahoma.

Certificate of Clerk.

United States of America, Eastern District of Oklahoma, ss.

I, W. V. McClure, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of W. P. McCullough, et al., vs. W. M. Smith, No. 2305 in Equity, as was ordered by præcipe of counsel to be prepared and authenticated, as appears from the records in my office, except petition of plaintiffs, which is included in amended bill of complaint.

I further certify that the citation attached hereto, and returned herewith, is the original citation issued in this cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in the City of Muskogee, this 22nd day of June, A. D. 1921.

W. V. MCCLURE, Clerk,

(Seal) By WARREN BUTZ, Deputy.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, DECEMBER TERM, 1921, THURSDAY, JANUARY 12, 1922

No. 5892

WESLEY M. SMITH, Appellant,

vs.

W. P. MCCULLOUGH et al.

Appeal from the District Court of the United States for the Eastern District of Oklahoma

ORDER OF SUBMISSION

This cause having been called for hearing in its regular order, argument was commenced by Mr. Arthur S. Thompson for appellant and concluded by Mr. Paul A. Ewert for appellees.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

OPINION—Filed December 23, 1922

SANBORN, Circuit Judge, delivered the opinion of the Court.

The plaintiffs, appellees here, brought a suit in equity against the defendant Smith, here the appellant, and secured a decree against him to the effect that the mineral oil and gas lease of the 120 acres in controversy from Leander J. Fish, a Quapaw Indian, to Dallas Hopper, of April 29, 1912, which Hopper had assigned to the plaintiffs, was valid; that the mineral oil and gas leases from Leander J. Fish to the defendant of November 4, 1912, and January 6, 1913, were void as against the rights of the plaintiffs and that the defendant be perpetually enjoined from interfering with the plaintiffs' possession and use of the premises. From this decree the defendant has appealed.

The plaintiffs' lease required them to commence operations to prospect for and develop oil, gas, or other minerals within ninety days after its date, and defendant's counsel argue that this decree should be reversed because the plaintiffs did not enter upon the land leased within the ninety days. But neither such an entry nor the commencement of operations within that time was indispensable to the maintainance of a suit the recovery of the relief in equity against the defendant claiming under the subsequent leases which

the plaintiffs obtained, for the plaintiffs had paid the dollar consideration for the lease and the rental fixed therein, five cents per acre per annum, in case such operations were deferred. Guffey v. Smith, 237 U. S. 101, 112, 119 and M'Cullough v. Smith, 243 Fed. 823, 825, 833, 834, 835, wherein the pertinent provisions of the plaintiffs' lease are set forth, and their legal effect was stated, discussed and adjudged by this court. It is true that our decision at that time was based upon the averments of the complaint that the lessee Hopper and the plaintiffs had immediately after the date of the lease entered upon, continued in possession of, and prospected, developed and drilled the land. But under the decision in Guffey v. Smith, supra, such possession and operation were not necessary to the maintenance of this suit, and the court below found in its decree that the plaintiffs were in possession of the land under their lease at the time of the commencement of this suit.

The lessees' agreement to begin operations within ninety days after the date of the lease is a part of the paragraph of the lease which also provides that in case such operations are not commenced within that time the lessees agree to pay to the lessor five cents per acre yearly for each acre of the land described in the lease "in lieu of said work". It is contended that this provision for a postponement of the prospecting, drilling and development of the mineral on this 120 acres for six dollars per year renders the lease so unconscionable that a court of equity ought not to protect or enforce any rights or interests of the lessees thereunder. The arguments, the authorities and the exhaustive brief in support of this position have received studious and deliberate consideration. But the Supreme Court has decided that similar clauses in like leases do not bar lessees from relief in equity from the interference with their rights thereunder by subsequent lessees Guffey v. Smith, 237 U. S. 211, 216, and this court held in 1917 that this provision in this lease did not appear to invalidate it, 243 Fed. 834, cited Brewster v. Lanyon Zinc Company, 140 Fed. 801, and added that the question whether or not that clause rendered the lease unfair or inequitable must be determined upon the final hearing upon the issues between the parties. That final hearing has been had and the court below has found that the lease was not inequitable or unfair. There is no averment in the answer of the defendant that this clause or the lease that contained it was unjust or unconscionable, and counsel in his brief calls attention to no evidence to that effect. The issue whether or not the lease was unfair or inequitable must be determined in view of the circumstances at the time it was given. Guffey v. Smith, 237 U. S. 101, 116; Willard v. Tayloe, 8 Wall. 557, 570, 571; Marble Company v. Ripley, 10 Wall. 339, 357; Franklin v. Harrison, 145 U. S. 459, 473. Prima facie the clause and the lease were fair and just. The burden was upon the defendant to prove that they were unconscionable or inequitable. The original parties to the lease had the right to agree and deliberately agreed to the clause in question and to the other terms of the lease, and neither of them sought relief therefrom. The lease and that clause in it were in the customary form of such leases

and clauses in the State of Oklahoma and differed from others only in the amount per acre specified for the yearly postponement of the work. This lease was made April 29, 1912. The defendant's leases were made November 4, 1912, and January 6, 1913, and each of them contains a clause whereby the lessee agreed to pay ten cents per acre yearly in lieu of work in case he did not commence operations within the time therein stipulated therefor. When the plaintiffs' lease was made in April, 1912, no one had any knowledge of any oil, gas or mineral in or under the land thereby leased. There had been no drilling for or development of such minerals, and there was no drilling for or development in the vicinity of these lands sufficient to make it probable that such minerals would be found until some time in the year 1914. It was not until May 8, 1915, that a discovery of a mine was made on a tract adjacent to the 120 acres here in dispute. None had then been discovered on this land. It is difficult to perceive anything in that state of facts that would indicate that in April, 1912, there was any probability that oil or other mineral would ever be found in the land leased, or that the right to prospect for and develop it had or would ever have any substantial value. The discovery of mineral therein was a mere possibility. The probability was that the effect of the lease would be the receipt by the lessor of six dollars per year clear gain and the loss by the lessees of the six dollars per year they paid, for this is the natural and usual result of such leases. Those under which no minerals are discovered are many times as numerous as those under which a valuable discovery is made. And the conclusion is that the defendant failed to prove that the clause under consideration or the lease which contains it was either unfair, unjust or inequitable.

Counsel object to the decree, (1) on the ground that the five cents per acre yearly was not paid but the court below found that it was paid and there was substantial evidence to sustain that finding, and (2) on the ground that the plaintiffs abandoned the lease, but the court below found that they did not abandon the lease and there was substantial evidence to sustain that finding. Nor is all the evidence in the record on these questions of fact, when taken together, convincing that any mistake was made by the court below in either of these conclusions. The legal presumption is that the findings and decrees of a court of chancery are right and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law or some grave mistake has been made in the consideration of the facts. Tilghman v. Proctor, 125 U. S. 136; Kimberly v. Arms, 129 U. S. 513; Stearns-Roger Mfg. Co., v. Brown, 114 Fed. 939, 943; Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 88.

Counsel persuasively and exhaustively argue that because of the terms of the plaintiffs' lease the lessees were not required to enter into actual possession of the land until eighty-nine days after its date, and because they did not enter into possession thereof imdiately after its date their lease was not a lease in possession and was unauthorized and void under the decision of the Supreme Court

denouncing overlapping leases in United States v. Noble, 237 U. S. 74. This position was taken and presented to this court in a very elaborate and exhaustive brief and found by it to be untenable when this case was here in 1917, and a reconsideration of it in this case has failed to convince that there was any error in that conclusion. This lease, upon its execution and delivery, granted to the lessee a present vested interest in the land described in it, the right to such possession of that land as should be necessarily or reasonably convenient to enable the lessee to prospect for and extract the minerals from the land and the right to relief in equity against the interference with that right or with the exercise thereof by trespassers or by those holding inferior rights or interests in the land. Aggers v. Shaffer, 256 Fed. 648, 649; Northwestern Oil & Gas Co. v. Branine. 175 Pac. (Okla.) 533, 534; Rich v. Doneghey, 177 Pac. (Okla.) 86, 88, 89. Counsel has not failed to make other objections to the validity of the paintiffs' lease, but they are answered in the opinions in the cases to which reference has already been made.

A reversal of the decree is demanded because plaintiffs pleaded in their complaint, and, as the defendant insists, failed to prove that the lessee Hopper immediately on the execution of the lease to him entered into possession of the land leased and that ever since that time he and the plaintiffs have remained in possession thereof, prospected and developed the premises and had sunk numerous tests, or drilled holes upon the land. It is insisted that these allegations and the absence of proof of these facts estopped the plaintiffs from any recovery because this pleading was false. But even if the plaintiffs failed to prove the allegations just recited, that fact constitutes no estoppel because the existence of those facts was not indispensable under the terms of the plaintiffs' lease to their recovery, because there is no evidence that those averments deceived the defendant and because there is no evidence that he was led by them to change his situation to his injury.

During the final hearing of this case after the plaintiffs had introduced their evidence and rested and while the defendant was presenting his testimony, the defendant, for the purpose of establishing an estoppel of the plaintiffs from maintaining this suit, moved to amend his answer and to plead and prove these facts; that this suit was commenced on July 1, 1916, that on September 29, 1916, the plaintiffs McCullough and Landrum commenced a suit in the District Court of Ottawa County, Oklahoma, against J. E. Pottorff, defendant Smith and others, to recover from them certain shares of royalties that they alleged that Pottorff and Smith by virtue of the leases of Fish to Smith had collected and which Pottorff and Smith had agreed in 1913 to pay to McCullough and Landrum for their advance of certain amounts of money to pay for drilling four holes on a forty acre tract of land included in the leases of Fish to Smith but not included in the lease to Hopper, upon which this suit is founded. The court below, upon the objection of the plaintiffs, refused to permit the amendment of the answer, and refused to admit in evidence the proposed proof. Coun-

sel argue that the proof thus offered should have been received because it disclosed a claim of McCullough and Landrum under the leases to Smith so inconsistent with the claim in this suit of the invalidity of those leases as to estop the plaintiffs from maintaining any proceeding to avoid them. But in the suit in the state court McCullough and Landrum claimed that they advanced their money to pay for drilling the four holes in a forty acre tract not included in the lease to Hopper. They claimed that they made the contract with Pottorff and Smith, and advanced the money in 1913, and at that time they had no interest in the lease to Hopper. It was not until the Sprng of 1915 that they procured such an interest, and finally their claim against Pottorff and Smith in the state court was based on the alleged personal agreement of those gentlemen to pay them for the advances they made to pay for the drilling of the four holes, and it did not assert, challenge or involve the validity or invalidity of any of the leases. There was no inconsistency in the collection or the attempt to collect that claim, and the maintenance of this suit to establish the invalidity of the Smith leases as against the prior lease of the 120 acres to Hopper, and the court below fell into no error when it denied the motion to admit and rejected the evidence of the suit in the state court.

A forcible and persuasive argument is made to the effect that because the defendant drilled and developed the land in controversy at great expense and extracted lead and other minerals of great value from it, his equities are superior to those of the plaintiffs, but he did all this when the plaintiffs had an exclusive valid lease of, and right to secure the minerals, oil and gas in the land described therein, duly recorded, and the defendant had full legal notice thereof. Parties without right or with inferior right to such property cannot acquire superior equities or rights to it to the rights and equities of recorded owners by boldly taking it with great activity at great expense. The owner has the right to it, and law and equity alike guard and protect that right. The decree below must be affirmed, and it is so ordered.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

Appeal from the District Court of the United States for the Eastern District of Oklahoma

DECREE

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that W. P. McCullough, B. E. Beth, Thomas F. Phillips, Frank Gaines, Theresa McClelland, F. M. Landrum, A. C. Towne, and Paul A. Ewart have and recover against Wesley M. Smith the sum of twenty dollars for their costs herein and have execution therefor.

December 23, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed February 19, 1923

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

The appellant, Wesley M. Smith, requests a rehearing and reargument on the judgment in the above cause rendered and filed herein on the 23rd day of December, 1922, upon the following ground, to-wit:

I. The court erred in refusing to hold that appellees were estopped to maintain this suit on account of their former position in legal proceedings in the state court concerning the same subject matter.

Appellant would not urge this petition for rehearing on this particular ground were it not clearly evident from the opinion filed that the court obtained a wrong impression of the facts as disclosed by the record.

The opinion in dealing with the claim of estoppel reads:

"During the final hearing of this case after the plaintiffs had introduced their evidence and rested and while the defendant was presenting his testimony, the defendant, for the purpose of establishing an estoppel of the plaintiffs from maintaining this suit, moved to amend his answer and to plead and prove these facts: that this suit was commenced on July 1, 1916, that on September 29, 1916, the plaintiffs, McCullough and Landrum commenced a suit in the District Court of Ottawa County, Oklahoma, against J. E. Pottorff, defendant Smith and others, to recover from them certain shares of royalties that they alleged that Pottorff and Smith by virtue of the leases of Fish to Smith had collected and which Pottorff and Smith had agreed in 1913 to pay to McCullough and Landrum for their advance of certain amounts of money to pay for drilling four holes on a forty acre tract of land included in the leases of Fish to Smith but not included in the lease to Hopper, upon which this suit is founded. The court below, upon the objection of the plaintiffs, refused to permit the amendment of the answer, and refused to admit

in evidence the proposed proof. Counsel argue that the proof thus offered should have been received because it disclosed a claim of McCullough and Landrum under the leases to Smith so inconsistent with the claim in this suit of the invalidity of those leases as to estop the plaintiffs from maintaining any proceeding to avoid them. But in the suit in the state court McCullough and Landrum claimed that they advanced their money to pay for drilling the four holes in a forty acre tract not included in the lease to Hopper. They claimed that they made the contract with Pottorff and Smith, and advanced the money in 1913, and at that time they had no interest in the lease to Hopper. It was not until the spring of 1915 that they procured such an interest, and finally their claim against Pottorff and Smith in the state court was based on the alleged personal agreement of those gentlemen to pay them for the advances they made to pay for the drilling of the four holes, and it did not assert, challenge or involve the validity or invalidity of any of the leases. There was no inconsistency in the collection or the attempt to collect that claim, and the maintenance of this suit to establish the invalidity of the Smith leases as against the prior lease of the 120 acres to Hopper, and the court below fell into no error when it denied the motion to admit and rejected the evidence of the suit in the state court."

This, in our opinion, is clearly an erroneous statement of the facts established and uncontroverted by the record. The plaintiffs in the state court did not claim nor sue for money advanced, but did actually seek a judgment against this appellant establishing their right to an accounting for a share of the royalties then paid and to be paid on the entire 200 acres of the Fish allotment, and this included the acreage involved in this suit at bar.

Please note our amendment to answer, Record, pp. 283-284.

The best evidence of the claim of plaintiffs is shown in their petition filed in the state court and verified under oath by Mr. McCullough. The petition is set out at length in the record at pages 237 to 247, inclusive, and here it is shown that they claimed they were interested in an oral sublease from Smith on the entire allotment of Fish aggregating 200 acres. They plead on pages 237-242, inclusive, as part of their cause of action in the state court, and in which they became interested the very identical leases that Smith set up in his answer herein (See Record, 16 to 21, inclusive). A comparison will show them to be identical. In appellees' reply herein (Record 21-23) they assert the invalidity of these leases.

We call to your attention that McCullough at the trial was shown defendants' Exhibit No. 1 (his petition in the state court, Record 237-247) and he acknowledged his signature thereto, which was under oath (R. 66).

Please note the contents of the petition in the state court (R. 237-247); they say Smith obtained two mining leases from Fish, and, combining the acreage, they cover the East Half of Northwest Quarter and West Half of Northeast Quarter and Southeast of Northeast Quarter, all in Section 32, Township 29 North of Range 23, or

200 acres. (This includes the acreage in the Hopper lease. Record Hopper lease, page 9.) They further plead they (plaintiffs in state court suit) under an oral sublease from Smith, developed the property; that Smith, ignoring his sublease to them, subleased to Church and Mabon and set out again the acreage let to Church and Mabon, which is the entire 200 acre tract (including the acreage in the Hopper lease, Record 243); that Church and Mabon were operating the property and paying Smith 15% royalty or 5% more than plaintiffs were obligated to pay. They say (R. 247) they are entitled to a one-third of all royalties paid and to be paid and pray an accounting and judgment for such interest, and **(R. 247):**

"They further ask that all of the defendants be required to account with the plaintiffs for one-half of the 5% extra royalty demandable under the lease from and after the beginning of the suit for the defendants Mabon and Church, etc."

Here they seek judgment for an accounting against Smith on the entire acreage (including Hopper acreage) for accrued royalties and the establishing of their interest in the royalties to accrue during the life of the lease and their claim is bottomed on the alleged oral sublease from Smith.

It is true counsel for appellees herein by brief and oral statement in argument insisted McCullough and his associates claimed an interest under Smith in the state court suit in only one forty acre tract, but this claim of counsel has confused the court and is a direct contradiction of the formal claim as shown by the pleading as we have shown. It is also opposed to the interpretation of McCullough as he testified when examined concerning the matter (R. 183):

"Q. If you recover in this law suit you are seeking to recover what?
A. Just exactly what is due me.
Q. What is it?
A. My interest in five per cent of the royalties on that land.
Q. On the 200 acres?
A. 200 acres.
Q. Based upon the Smith lease?
A. Yes, sir."

It is true that all the drilling done by McCullough and his associates under their alleged oral sublease from Smith was done on a forty acre tract not included in the Hopper lease, but that is immaterial. They were claiming and seeking by judgment to establish an interest in and under the Smith lease on the whole 200 acre tract.

Nowhere in their petition in the tsate court do they seek judgment for money advanced by them for drilling, but bottom their suit in equity for an interest in these leases on 200 acres under Smith. In the case at bar they seek to destroy the very leases they claimd under in the state court.

Our attention has been called to a recent decision of this court, Hertzel v. Weber, 283 Fed. 921. In this case Hertzel claimed an interest in a sublease and an accounting thereon on oil property with Weber in a state court proceeding. He lost his suit. He then purchased the fee to the land and then brought suit in the Federal Court seeking cancellation of the Weber lease alleging it to be void.

In the case at bar the same identical proceeding happened, only McCullough purchased a lease instead of the fee. This court, in Hertzel v. Weber, supra, said (page 930):

"He insisted throughout the litigation in the state courts that the arrangement which Weber had made with the lessees was a valid and binding obligation and that he was entitled to an interest in it. After such conduct he should be estopped on familiar principles from thereafter asserting the contrary. * * *

"Conceding for the moment that Weber's contracts were in their inception void, and that the defense of res adjudicata was not sustained, we hold that Hertzel's conduct estops him from claiming that he did not take title to the tracts subject to the rights which those contracts purported to give Weber."

In the case at bar at the very time this cause was being tried McCullough and associates were pressing their appeal in the State Supreme Court (Record, 285). If they should win in the state court Smith would be required to account to them for royalties on account of his oral sublease to them, and if this judgment in this court shall stand he shall be required to account again to them on the theory his possession has been under a void lease.

Courts of equity should not permit shifting of position in his matter. In one proceeding we are sought to be required to account because they are our tenants. In the other we must respond in accounting because our lease title is void, and these two inconsistent positions being maintained at the same time in different courts and concerning the same subject matter.

Surely the court did not grasp the full significance of our position. The court certainly misapprehended the facts as shown by the record.

The amended answer was not a surprise to appellees. In the opening statement by Mr. Thompson for appellant he informed the court and appellees that this matter would be offered for defense (Record, 38). The appellees not only did not deny the truth of such matter, but admitted the evidence offered as true.

But really was an amendment to the answer necessary? We think not. The estoppel is rather a refusal of relief to the party on the theory that justice revolts at such conduct.

"The rule that a party will not be allowed to maintain inconsistent positions in judicial proceedings is not strictly one of estoppel, partaking rather of positive rules of procedure based on manifest

justice and, to a greater or less degree, on consideration of the orderliness, regularity and expedition of litigation."

10 R. C. L. 698, and other cases cited in our main brief at pages 81 to 87.

This evidence is admissible as a judicial admission.

"One class of admissions consists in statements made by parties in the course of judicial proceedings, generally termed judicial admissions. Such statements are evidence against a party, and may constitute the basis of a verdict, whether made in pleadings and other written assertions, or orally by counsel."

1 R. C. L. 469.

"A party who as defendant in an equity case has successfully asserted that his adversary's claim is not cognizable in equity, cannot subsequently in an action at law brought by him against the plaintiff involving the same matter, assert that the same claim set up as a defense is of an equitable character."

217 U. S. 257.

Also cases main brief herein, pages 84 to 87.

In conclusion we urge that the court in our opinion has reached an erroneous conclusion because of misapprehension of facts clearly established and uncontradicted by the record.

Respectfully submitted, A. Scott Thompson, Miami, Oklahoma, Attorney for Appellant.

[File endorsement omitted.]

Jurat showing the foregoing was duly sworn to by A. Scott Thompson; omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

ORDER DENYING PETITION FOR REHEARING

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

August 13, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

ORDER STAYING ISSUANCE OF MANDATE UNTIL OCTOBER 1, 1923

On motion of Appellant for a stay of the mandate of this Court until October 1, 1923, and upon perfection of an appeal to the Supreme Court of the United States that the mandate be further stayed pending such appeal, It is now here ordered, by this Court, that the issuance of the mandate of this Court be, and the same is hereby, stayed until October 1, 1923.

September 11, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR APPEAL TO SUPREME COURT U. S. AND ORDER ALLOWING SAME—Filed October 1, 1923

To the Honorable William Howard Taft, Chief Justice, or to any Associate Justice of the Supreme Court of the United States:

Now comes the appellant, Wesley M. Smith, and, feeling himself aggrieved by the decree made and entered in this cause on the 23rd day of December, 1922, and made final by the order of this court in denying petition for rehearing on the 13th day of August, 1923, in affirming the decree of the United States District Court for the Eastern District of Oklahoma, does hereby appeal from said decree and order to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and complains that manifest error has intervened in said cause to the great damage of said appellant; that the matter in controversy exceeds $3,000.00 in value exclusive of interest and cost; that the jurisdiction of the District Court of the United States for the Eastern District of Oklahoma depended upon the fact that there was a federal question involved in said cause, to-wit, the construction of treaties and laws of the United States made and enacted respecting the Quapaw tribe or band of Indians and their allotted lands; and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final; and said appellant prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record of proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States sitting at Washington, District of Columbia, according to the rules of such court in such cases made and provided, and the appellant further prays that a proper order touching the security and supersedeas to be required of him to perfect his appeal be made.

A. Scott Thompson, Solicitor for Appellant.

Now on this 27th day of September, 1923, on motion of A. Scott Thompson, solicitor and counsel for appellant, it is hereby ordered that the appeal to the Supreme Court of the United States from the order, judgment and decree filed and entered herein as prayed for above be and the same is hereby allowed, and that a certified copy of the transcript of the record and all proceedings herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $5,000.00, and upon approval and filing of same all proceedings hereunder in this court be stayed pending said appeal.

Kimbrough Stone, Circuit Judge.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

ASSIGNMENT OF ERRORS ON APPEAL TO SUPREME COURT U. S.—Filed October 1, 1923

Now comes the appellant in the above entitled cause and files the following assignments of error and says that in the record and proceedings and in the final order, judgment and decree in said cause, entered, manifest errors have intervened to the prejudice of this appellant, and that the following assignment of errors are those upon which he will rely upon prosecution of his appeal in the above entitled cause from the judgment, order and decree made by the Circuit Court of Appeals for the Eighth Circuit on the 23rd day of December, 1922, and made final by overruling petition for rehearing in its order filed on the 13th day of August, 1923:

I. The District Court and the Circuit Court of Appeals erred in holding and decreeing that appellees' mining lease dated April 29, 1912, and executed by Leander J. Fish, a Quapaw Indian, upon his allotted lands, was valid, and that the terms and provisions thereof challenged by appellant are not in violation of the Act of Congress of the United States approved March 2, 1895 (28 Stats. p. 927), and the Act of Congress of the United States approved June 7, 1897 (30 Stats. 72).

This lease, while for a term of ten years from date, contains the further grant:

"If oil, mineral or any other substance of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals or other substance of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease."

Said judgment and decree is erroneous because:

(a) The lease grants a term in perpetuity and is therefore void as against the restraint upon alienation imposed by Act of Congress of March 2, 1895, supra, and in excess of the power conferred by the leasing statute, Act of Congress approved June 7, 1897, supra.

(b) The lease grant in perpetuity violates the policy of the Government of the United States toward its Indian wards generally, and particularly the Quapaw Indians, as expressed in said statutes. The lease further contains the following provision:

"The party of the second part agrees to begin operations on the above described premises within ninety days after the date of this lease; in case such operations do not begin during said stated time said second party agrees to pay to said first party five cents per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their heirs desire to operate or hold the same."

The decree is erroneous because:

(a) This last mentioned paragraph invalidates the lease because it was an unauthorized exercise of the power to lease granted the Quapaw Indian by the Act of Congress of June 7, 1897, supra. It was not within the power of the Quapaw Indian to execute a lease for mining containing a clause that would enable the lessee to hold his land for even a ten year term for speculative purposes for the mere pittance of five cents per acre annually in lieu of work and thereby empower the lessee to prevent mineral development for the entire term if he chose so to do.

II. The court erred in holding that the petition filed herein stated facts entitling appellees to relief in equity and directing that the motion to dismiss filed by appellant be overruled because the basis of the cause of action plead was the lease made by Leander J. Fish, a Quapaw Indian, and it was void for the reasons assigned in Assignment No. I.

III. The court erred in its conclusions herein upon the following facts disclosed by the record:

The appellees herein base their right to recover herein upon their ownership in a certain mining lease executed by Leander J. Fish, a Quapaw restricted Indian, to Dallas Hopper, their assignor, and dated April 29, 1912, and seek to cancel two certain leases made by the same Indian allottee to the appellant, Wesley M. Smith, dated November 4, 1912, and January 6, 1913, respectively, because said leases are inferior to the lease made to Dallas Hopper and are therefore void. This record discloses that on September 29, 1916, the appellees and their assignors began a suit in the District Court of Ottawa County, Oklahoma, against this appellant and other persons, charging: that this appellant held two certain mining leases

on the lands involved, dated November 4, 1912, and January 6, 1913 (same leases sought to be canceled herein, and including the lands in the Dallas Hopper lease owned by the appellees) and in said suit copies of said leases are set out, and further charged that the appellant herein, Wesley M. Smith, made an oral sublease to the plaintiffs in said suit in said state court in the summer of 1913, and that under said sublease they had expended money in prospecting said land for minerals as the sublessee of this appellant, and that in pursuance of said sublease they discovered a large body of lead and zinc ore, and that thereafter this appellant entered into a conspiracy with his codefendants in said state court proceedings to deprive plaintiffs in that suit of any interest in said property, and that the said Wesley M. Smith, appellant herein, thereupon executed a sublease in writing to L. C. Church, and J. S. Mabon, on the entire 200 acres of said allotment (which includes the lands involved herein) and further charged that under said written sublease made to said L. C. Church and J. S. Mabon a large amount of ores had been mined and sold, in which the plaintiffs therein and the appellees herein had an interest, and that a large amount of royalties had been derived from these operations, and prayed that the court decree them to have such interest, that an accounting be had, and they be given judgment for their interest in such royalties, and that they be decreed a certain interest in the royalties to accrue during the term of the subleases made to L. C. Church and J. S. Mabon; that the case in the state court was tried and appellant herein obtained judgment in said suit and the plaintiffs therein appealed said cause to the Supreme Court of the State of Oklahoma, where same was affirmed; that said appeal was pending and being prosecuted by the appellees herein at the time of the trial of this cause in the District Court at Muskogee, Oklahoma. The court erred in its judgment and decree for the appellees herein and holding that the claim of the appellees in the state court as sublessees under the appellant herein, Wesley M. Smith, was not inconsistent with their claim in the case at bar, where they seek to destroy and have canceled the leases of the appellant, Wesley M. Smith, and in refusing to hold that it was a complete estoppel as against said appellees and conduct which should bar them from relief herein.

IV. The court erred in not permitting this appellant to file an amendment to his answer charging more in detail the fact of such state court proceeding, after the evidence had been admitted and the appellees herein had admitted that such allegation of proceeding in the state court was correct.

V. The court erred in rendering judgment for the appellees because:

The appellees in the trial of this cause admitted that they had never entered upon or taken possession of said property for more than three years after the date thereof, but relied upon their payment of five cents per acre yearly to hold said lease. This was error,

because the appellees by such admission accepted the alternative in the lease of paying money in lieu of work and gave full force and effect to such provision of said lease contrary to the Act of Congress of June 7, 1897, supra, which is the leasing statute conferring power upon the Quapaw Indian to make mining leases and is contrary to the policy of the United States Government toward its Indian wards, and is beyond the power of the Quapaw Indian to bind his land and his heirs thereto, to follow.

VI. The court erred in its judgment and decree in holding that the lease claimed by the appellees is not a lease to commence in futuro as condemned by the Supreme Court of the United States in United States vs. Noble, 237 U. S. 74.

VII. The court erred in rendering judgment for the appellees and in sustaining their lease for the reason that said lease does not obligate the lessees to work or mine said land, but does permit said lessees to pay five cents per acre yearly in lieu of work so long as they desire to operate or hold the same, and this unilateral contract is not binding upon the Quapaw allottee and is void because it is inequitable and beyond the power of the Quapaw lessee to so bind his land pursuant to the Acts of Congress heretofore referred to and is contrary to the policy of the Government of the United States in its dealings toward the Quapaw Indians.

VIII. The court erred in finding that the appellees or their assignor had paid five cents per acre annually for the three year period before they claim to have taken possession of said land.

IX. The court erred in finding that the appellees have acquired by assignment the mining lease executed by the Quapaw allottee on April 29, 1912, to Dallas Hopper, for the reason that this record does not disclose that these appellees have acquired the whole interest in said lease.

X. The court erred in finding and adjudging all the issues in the case for the appellees against this appellant and granting the relief prayed for, because the evidence does not sustain such finding and judgment and should have been for the appellant.

XI. The court erred in failing to find that the appellees had abandoned their lease by failing for more than three years to perform any of the covenants to prospect and mine under said lease and by their conduct in buying and selling interests therein for nominal consideration.

XII. The court erred in permitting appellees to add additional parties after the trial had been had.

XIII. The court erred in its judgment decreeing relief to the appellees and quieting their title against the appellant herein for the reason that the appellees were not in possession of said lands or any part thereof at the time of the institution of the suit or subsequent

thereto, and the court as a court of equity did not obtain jurisdiction to quiet title when the appellees were out of possession and the appellant was in possession of the lands involved herein.

XIV. The court erred in its judgment in cancelling the leases of this appellant and refusing to sustain the validity and superiority of appellant's leases and in refusing to quiet his title as prayed for in his answer and cross-bill. This was error because the lease of the appellees was invalid and void for the reasons heretofore assigned.

XV. The court erred in its judgment for the appellees and in refusing to deny relief to said appellees because of their false pleading in alleging that they took immediate possession of said land upon the execution of their said lease and worked continuously thereunder by prospecting, drilling and developing the ore bodies thereon. The evidence discloses that the appellees admitted, and do not dispute, that they made no attempt to take possession or do anything upon this property for a period of more than three years after the execution of said lease. The judgment was erroneous in refusing to hold that a court of equity would grant no relief to parties guilty of such conduct in a court of equity.

Wherefore this appellant prays that the order, judgment and decree be reversed, that the Circuit Court of Appeals for the Eighth Circuit be ordered to enter decree reversing the decision and judgment of the District Court of the United States for the Eastern District of Oklahoma in said cause, and that it enter a decree as prayed for in appellant's answer filed herein.

A. Scott Thompson, Solicitor for Appellant.

[File endorsement omitted.]

SUPERSEDEAS BOND ON APPEAL FOR $5,000—Approved and filed October 1, 1923; omitted in printing

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

PRÆCIPE OF APPELLANT FOR TRANSCRIPT ON APPEAL TO SUPREME COURT U. S.—Filed October 15, 1923

The Clerk of the Circuit Court of Appeals of the United States for the Eighth Circuit is hereby directed to prepare a certified transcript of the record for appeal in the above entitled cause for the use of the Supreme Court of the United States, including the following:

1. Copy of this præcipe.

2. The entire record as printed and used in this court in the case of W. P. McCullough and others vs. Wesley M. Smith, being numbered 4784. This was the former appeal in the case entitled above.

3. The order of this court submitting Cause No. 4784 above described on briefs.

4. The order, judgment and decree reversing the District Court in W. P. McCullough et al. vs. Wesley M. Smith in cause 4784 above described.

5. The order filing petition for rehearing in cause 4784 above described.

6. The order overruling petition for rehearing in cause 4784 above described.

7. The mandate in cause No. 4784 above described.

8. The entire record as printed and used in this court in this cause now being appealed.

9. Petition for rehearing filed herein by appellant and showing order of filing thereof in this cause.

10. The order overruling petition for rehearing.

11. The order, judgment and decree affirming the decree of the District Court herein.

12. The order for the mandate.

13. The mandate.

14. The petition for appeal and order allowing appeal to the Supreme Court of the United States, the assignments of error filed therewith, and bond in appeal filed herein.

15. Citation herein and acknowledgment of service thereon.

A. Scott Thompson, Attorney for Appellant.

Receipt of a copy of the above præcipe is admitted as of this date, to-wit, the 13 day of October, 1923.

Paul A. Ewert, A. C. Towne, James S. Davenport, Attorneys for Appellees.

[File endorsement omitted.]

CITATION—In usual form, showing service on Ewert, Towne & Davenport; filed October 15, 1923; omitted in printing

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing tran-

script of record on the appeal to the Supreme Court of the United States in the case of Wesley M. Smith, Appellant, vs. W. P. McCullough, et al., No. 5892, prepared in accordance with the præcipe of counsel for appellant, consists of two volumes.

I do further certify that Volume I, consisting of pages 1 to 45, inclusive, contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein W. P. McCullough, et al., were Appellants, and W. M. Smith was Appellee, No. 4784, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that Volume II, consisting of pages 1 to 329, inclusive, contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Wesley M. Smith was Appellant and W. P. McCullough, et al., were Appellees, No. 5892, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation on the appeal to the Supreme Court of the United States in cause No. 5892, with acknowledgment of service endorsed thereon, is attached to Volume II and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fourth day of October, A. D. 1923.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal of the United States Circuit Court of Appeals, Eighth Circuit.)

Endorsed on cover: File No. 29,947. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 637. Wesley M. Smith, appellant, vs. W. P. McCullough, B. E. Beth, Thomas F. Phillips, et al. Filed November 9th, 1923. File No. 29,947.

[redacted]

No. [redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, [redacted] 1975

WESLEY M. SMITH, APPELLANT

VS.

W. P. McCULLOUGH ET ALS., APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION TO DISMISS APPEAL

A. Scott Thornbrugh,
Miami, Oklahoma,
Attorney For Appellant

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ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION TO DISMISS APPEAL.

The appellees have correctly quoted the amended bill in their motion, and it will not be recopied herein.

The point urged by movants is: That jurisdiction of the Circuit Court was based on diversity of citizenship of the parties solely, and the judgment of the Circuit Court of Appeals is final, from which no appeal is allowed.

Jurisdiction was not Based on Diversity of Citizenship.

This action was filed as an original action in the District Court of the United States for the Eastern District of Oklahoma. The first paragraph of the bill discloses the citizenship of two plaintiffs to be *Oklahoma*, one in Kansas, and the defendant in Kansas *also*.

If jurisdiction was claimed on account of diversity of citizenship it would be denied for two reasons:

First. Because plaintiffs residing and claiming citizenship within the jurisdiction of the District Court of their residence cannot maintain a suit in such District Court of the United States against a non-resident or non-citizen thereof solely on ground of diversity of parties. It is unnecessary to cite authority for this position.

Second. Citizenship and residence of *all* plaintiffs must be different from that of *all* defendants. The bill avers plaintiff D. E. Beth to be a resident and citizen of Kansas, the same state of the residence and citizenship of Smith, the sole defendant. This averment destroyed any claim of jurisdiction based on residence or citizenship of the parties.

This court in *Anderson* v. *Watt*, 138 U. S. at page 702, said:

> "Since the Act of 1875, if it appears from the pleadings and proofs taken together that the defendants are citizens of the United States and reside, in the sense of having their permanent domicil, in the state of which the complainants are citizens (or that each of the indispensable adverse parties is not competent to sue or liable to be sued,

therein), the Circuit Court cannot maintain cognizance of the suit."

We then see that jurisdiction was obtained on other grounds than citizenship of parties and it is to the bill alone that we can look for jurisdictional averments.

Shulthis v. *McDougal*, 225 U. S. 561.

Circuit Court of Appeals Held that this Case Arose Under the Laws of the United States.

When the bill was filed herein defendant moved to dismiss the bill. The motion was sustained and appeal taken. The question before the Circuit Court of Appeals on this first appeal was the sufficiency of the bill, and in *McCullough et al* v. *Smith*, 243 Fed. 826, the court said:

> "It is probable that the jurisdiction could not be sustained upon the ground of diversity of citizenship, as it is alleged that the plaintiff, D. E. Beth, is a citizen and resident of the State of Kansas, and that the defendant, W. M. Smith, is a citizen and resident of the same state. But it will hereafter appear that this case 'arises under the * * * laws of the United States,' within the meaning of Judicial Code, Sec. 24, Sub. 1 (Act March 3, 1911, c. 231, 36 Stat. 1091, as amended U. S. Comp. St. 1916, Sec. 991), and the objection to the jurisdiction cannot be sustained.
>
> "Plaintiffs contend that the conveyance to Kellett was such an exhaustion of the power of alienation under the Act of the 59th Congress (34 Stat. 344) that all control over alienation of the lands in question under the Act of the 53d Congress (28 Stat. 907), and under the Act of the 55th Congress (30 Stat. 72), had ceased to exist when the lease was given by Fish, and that it was given not under the power conferred by the 59th Congress (34 Stat.

344), but absolved from any and all restrictions whatever. This involves a construction of the Act of Congress of May 2, 1890, c. 182, 26 Stat. 81, 94, Sec. 31, and the 14th Section of the Act of June 28, 1898, c. 517, 30 Stat. 495, 500."

The Court of Appeals in passing on the sufficiency of the bill discussed and attempted to construe three separate and distinct Acts of Congress, namely:

"The bill substantially alleges that on March 2, 1895, c. 188, Congress enacted 28 Stat. 876, 907, as follows:

'That the allotments of land made to the Quapaw Indians, in the Indian Territory, in pursuance of an Act of the Quapaw National Council, approved March twenty-third, eighteen hundred and ninety-three, be and the same are hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior; provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said Act of the Quapaw National Council subject to revision, correction, and approval by the Secretary of the Interior. And the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith; provided, that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents.' See *Goodrum* v. *Buffalo*, 162 Fed. 817, 89 C. C. A. 525.

"There was patented to Leander J. Fish some 200 and possibly 240 acres of land. On June 21, 1906, c. 3504, the Fifty-ninth Congress (34 Stat. 325, 344) enacted the following:

'That Leander J. Fish, an allottee of two hundred acres of land in section thirty-two, township twenty-nine, range twenty-three east, and of forty acres in section fourteen, township twenty-nine,

range twenty-four east, in the Quapaw Reservation, under the provisions of the Act of March second, eighteen hundred and ninety-five (twenty-eighth statutes, page nine hundred and seven), and the Act of March third, nineteen hundred and one thirty-first statutes, page ten hundred and fifty-eight), be, and he is hereby, authorized to alienate such portion of said lands as he may see fit, not exceeding one hundred and twenty acres, under such rules and regulations as the Secretary of the Interior may prescribe, and any conveyance of such land made by said Fish shall be executed subject to the approval of the Secretary of the Interior.' "

"On June 7, 1897, c. 3, Congress passed an Act (30 Stat. 62, 72):

'That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years for farming or grazing purposes, or ten years for mining or business purposes.' "

I.

The bill does state a case arising under the laws of the United States and substantially involves a dispute calling for the construction and effect of such laws.

These lands involved herein were patented to Leander J. Fish under Act of Congress approved March 2, 1895 (28 Stat. 876-907) as seen above. Pursuant to said Act of Congress the lands *were inalienable* for a period of twenty-five years from date of the patent. Congress by Act approved June 21, 1906, authorized the allottee to alienate his allotted lands subject to the approval of the Secretary of the Interior, as quoted above.

The allottee thereafter executed a mortgage which

was approved by the Secretary of the Interior. This mortgage was never foreclosed, but was released.

The allottee executed the mining lease under which the appellees claim. This mining lease contained certain stipulations on its face making it void *in toto* assuming that the giving of the mortgage by the allottee did not have the effect of removing the inhibition against alienation contained in the Allotment Act, *supra*. This, the appellees conceded, and they built their case on the theory that the special statute of June 21, 1906, *supra*, had the effect of removing all restrictions against alienation when the mortgage made thereunder was executed and approved. It then was the obligation of the court to construe or interpret the effect of this statute and the rights of the plaintiffs were dependent on such construction.

If the court should hold that the execution of the mortgage unforeclosed but released did not free the lands from the restrictions against sale found in the allotment statute, *supra*, then the rights of the plaintiffs depended on the construction and interpretation of the allotment statute of March 2, 1895, *supra*. In other words, was the mining lease held by plaintiffs authorized by said Act of Allotment or did it not violate its terms and was therefore void?

We have seen that Congress passed an Act approved June 7, 1897, *supra*, authorizing the Quapaw allottees to lease their lands for mining purposes for ten years.

If the land was not freed from restrictions against alienation by the Special Act of Congress mentioned, then the court was called upon to construe and interpret the

allotment and leasing authority statute in order to determine whether the mining lease claimed by plaintiffs was authorized or void as being in contravention of the two Acts specified.

This mining lease of plaintiffs was for a term of ten years * * * and "if oil, mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk, *the privilege of operating shall continue so long as oil, minerals, or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease.*"

The allotment statute forbid alienation of any kind. The leasing statute permitted the making of a lease for ten years only. Without the leasing statute the Quapaw Indian could make no mining lease. With the leasing power as granted in the Act of June 7, 1897, he could lease for ten years, *but no longer.* If he granted a lease for a longer term and in perpetuity (as here) is the lease valid for the authorized term and void as to the excess, or is not the lease void *ab initio* because it violates the express prohibition against alienation of the allotment statute and also violates the terms of the leasing statute in that it is beyond the power conferred on the Indian and was an attempt to secure the mining rights on this Indian land for an unlawful and unauthorized term.

These questions were necessarily before the court. The rights of plaintiffs depended on the interpretation of these laws of the United States adopted by the court.

The Circuit Court of Appeals held the giving of the mortgage did not free the lands from the control of the provisions of the allotment and leasing statute and further sustained the validity of plaintiff's lease for ten years and held the "perpetual term" of the lease to be void.

We are complaining of the construction of these statutes by the court in sustaining this lease. There should not be any doubt about our right to have such decision reviewed unless we have by delay lost our right.

II.

The right of appeal to this court has not been lost by failing to take appeal from the action of the Circuit Court of Appeal on the first appeal.

Appellees in their motion to dismiss and argument in support thereof copy all the pleadings (bill and answer) and devote three pages to a discussion of the merits of their motion.

This cause went to the Circuit Court of Appeals twice, first on the sufficiency of the bill, which was attacked by the defendant by motion to dismiss and sustained by the District Court. The Circuit Court of Appeals sustained the sufficiency of the bill, reversed the District Court, and directed that defendant be permitted to answer and proceed with trial on the merits.

McCullough et al. v. *Smith*, 243 Fed. 823.

Second, answer was then filed and cause tried and the plaintiffs prevailed. The defendant then appealed and the Circuit Court of Appeals acted on the merits for

the first time. *Smith* v. *McCullough*, 285 Fed. 698. This was a final judgment—an end of the controversy if unappealed from.

Appellees argue that because we did not appeal to this court from the decision of the Court of Appeals on the first appeal we are without right to have this court review the action of the Circuit Court of Appeals in sustaining their lease on the first appeal. They are certainly wrong. We had no appeal as there was no final judgment. The court was merely passing on the sufficiency of the bill.

In *Covington* v. *Covington First National Bank*, 185 U. S. 270, the court at page 277 said:

> "The court below in effect having reserved for future determination the right of the complainant below to enjoin the collection of a municipal tax for 1900 and subsequent years, this court obviously cannot decide that controversy. Matters within the pleadings having been left undetermined and the cause having been retained for the purpose of thereafter passing on them and for the entry of a further decree, the decree entered was not final."

In *Beebe et al.* v. *Russell*, 19 Wall. 284, the court said:

> "The whole cause is not, therefore, finally determined in the Circuit Court, and we are of the opinion that the cause cannot be divided so as to bring up distinct parts of it." * * * "When a decree finally decides and disposes of the whole merits of the cause and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the

cause again before the court for its final decision, it is a final decree."

In *Zeckendorf* v. *Steinfeld,* 225 U. S. 445, the syllabus is stated:

> "Whatever effect the decision of the Supreme Court of the territory may have, as the law of the case, on the lower court or on the Supreme Court itself, prior to an appeal to this court, it is not the law of the case for this court."

In *Buster* v. *Wright,* 135 Fed. 947, the identical question was presented and the court, at page 959, said:

> "The first decree of the Court of Appeals, which reversed the decree *that sustained the demurrer, was not reviewable by appeal,* because it was not a *final* decree. When appeal was taken to this court from the second decree of the Court of Appeals of the Indian Territory, which affirmed the decree that dismissed the bill upon the merits, *all the proceedings* from the inception of this suit became subject to review in this court for the first time. As prior to this time this court had never had the opportunity to review the first decision of the Court of Appeals of the Indian Territory, that decision was not the law of the case in this court."

In *Morgan* v. *Thompson,* 124 Fed. 205, it is stated:

> "Whether the question be considered from the standpoint of reason or of authority, the conclusion is inevitable that a judgment which reverses the order or judgment of a trial court, and remands the case for a subsequent hearing and adjudication of the rights of the parties, is not a final decision which may be reviewed either in the Supreme Court or in this court under the Acts of Congress to which reference has been made."

There can be no question but what the appellant, Smith, now has for the first time the right to have the Supreme Court of the United States review the decision of the court on the former appeal. The former judgment of the Circuit Court of Appeals was not a final decree in any sense, and as said by Mr. Justice Sanborn in *Buster* v. *Wright, supra,* "all the proceedings from the inception of this suit become subject to review in this court for the first time."

It would be a burden on the court to cite other authorities. There seems to be no authority to the contrary.

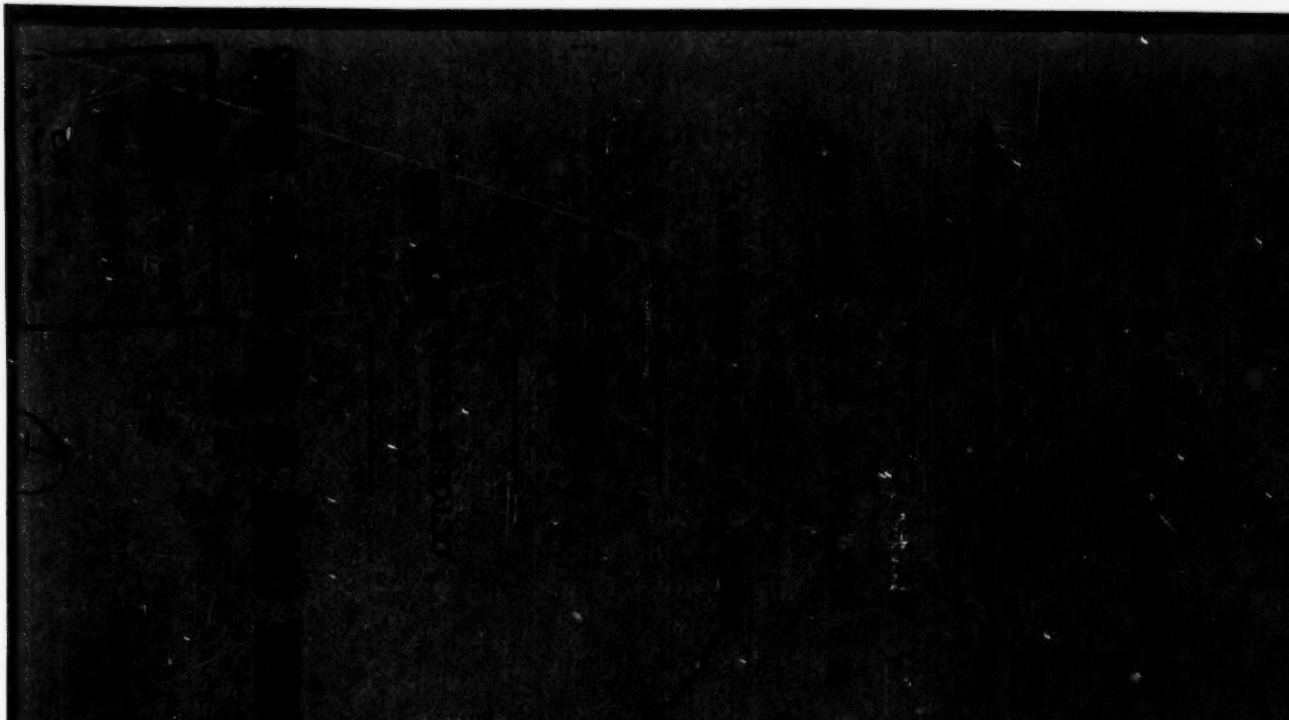
Appellees must concede jurisdiction in this cause was bottomed on a case arising under the laws of the United States calling for construction of such laws by the court. If not the court acquired no jurisdiction and the cause should be dismissed. Appellees concede questions were involved on the face of the bill that gave us a right to have an unfavorable decision reviewed by this court.

We have clearly seen that we have proceeded at the very first opportunity to present such questions to this court, and we are confident this court will not deny our right to review and will deny the motion to dismiss.

Appellees suggest in the concluding paragraph of their brief that the appeal is greatly prejudicing their right to mine this land. This never has been sufficient reason for denying the right of appeal.

Respectfully submitted,

A. Scott Thompson,
Miami, Oklahoma,
Attorney for Appellant.



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BRIEF AND ARGUMENT.

I.

Plaintiffs' lease void because:

(a) The lease under which plaintiffs claim is an entire contract and attempts to vest an estate in perpetuity, and being against the policy of the Government is void 17

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 216.

WESLEY M. SMITH, APPELLANT,

VS.

W. P. McCULLOUGH, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT.

For convenience herein we will refer to the parties as plaintiffs and defendant, as they appeared in the trial court, and references to record will be to the top paging in red figures where there is no more than one paging.

The plaintiffs filed their complaint herein in the United States District Court for the Eastern District of Oklahoma on July 1, 1916, and later, on September 11, 1916, filed their amended bill herein (Record, pages 1 to 10). The amended bill of complaint is practically the same as the original complaint, and charged diversity of citizenship, stating that plaintiffs McCullough and Phillips were citizens of the State of Oklahoma, and plaintiff Beth a citizen of the State of Kansas, and that defendant Smith was also a citizen of the State of Kansas. It seems clear from this statement of citizenship and residence of the parties that juris-

diction of the court was not based upon diversity of citizenship, as the fact of residence of one of the plaintiffs and the defendant being the same state, the court did not acquire jurisdiction to hear the cause on account of diversity of citizenship of parties.

The plaintiffs charged that the lands involved herein were a part of the allotted lands of Leander J. Fish, a Quapaw Indian, patented to him pursuant to the Act of Congress of the United States approved March 2, 1895, and being a part of the Indian Appropriation Act for the year of 1895 (28 Stats. p. 927). They further charged that thereafter Congress, by Act duly approved on June 21, 1906 (34 Stats., 325-344) did permit this allottee to alienate his allotted land under such rules and regulations as the Secretary of the Interior might prescribe. They further charge that a mortgage was executed by the allottee on the 14th day of July, 1906, and same was approved by the Secretary of the Interior. That thereafter the mortgage was duly released. That on the 29th day of April, 1912, the allottee executed and delivered to one Dallas Hopper a certain mining lease upon 120 acres of the 200 acres allotted to said allottee, pursuant to the Act of March 2, 1895, *supra*. This mining lease was executed by the allottee pursuant to the authority granted by Act of Congress approved June 7, 1897 (30 Stats. at L., 72), reading as follows:

> "The allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands or any part thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining or business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary; provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability of any allottee he cannot improve or manage his allotment properly and with benefit to himself the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

The plaintiffs further charge that the lessee Dallas Hopper assigned said lease to these plaintiffs; that

"immediately upon the execution and delivery of the said mining lease (Exhibit "C") by the said Leander J. Fish to the said Dallas Hopper, the said Dallas Hopper entered into possession of the said premises under and pursuant to the terms and conditions contained in said mining lease, and ever since said time he and his assignees, and now these plaintiffs, have remained in continuous possession of the said premises; that under and pursuant to the terms of said lease they have prospected and developed said land and have sunk numerous test or drill holes upon said lands and have sunk a shaft thereon and improved and developed the same for mining purposes."

The plaintiffs further charge that the defendant claimed some estate or interest in said land adverse to the plaintiffs and pray the judgment of the court quieting the title of said plaintiffs and the cancellation of any claim of said defendant.

The plaintiffs attach to their complaint mining lease under which they claim, marked Exhibit "C" (Record, pages 8 to 10, inclusive). An examination of this exhibit discloses that it is a mining lease granted by the Quapaw allottee upon a portion of his restricted allotment for a term of ten years from the date thereof, *and "if oil, mineral, or any other substance of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals or other substances of value can be produced in paying quantities upon such terms and conditions as parties hereto have herein agreed upon after expiration of this lease."* This exhibit further contains this clause:

"The party of the second part hereby agrees to begin operations on the above described premises within ninety days after the date of this lease; in case such operations do not begin within said stated time, second party agrees to pay said first party five cents per acre yearly for each and every acre contained in this lease *in lieu of said work so long as they or their assigns desire to operate or hold the same."*

To this complaint defendant filed motion to dismiss (Record, 11-13), asserting that the execution of mortgage by allottee and the release thereof did not constitute a removal of the restriction against alienation and that at the time of the execution of the mining lease to Hopper the land was still under restriction, and that the lease was void because it was in contravention of the

statutes of the United States, and that said complaint and amended complaint did not state facts sufficient upon which to base an action in equity. Before the trial court there was but one point argued, to-wit, whether or not the execution and release of the mortgage as charged in the complaint constituted a release of this land from the restrictions imposed by the Act of Congress of March 2, 1895, *supra*. It was conceded by plaintiffs at the argument that if the land was, at the time of execution of the Hopper mining lease restricted in the sense that alienation could not be had except with approval of the Secretary of the Interior, the mining lease executed to Hopper was void because it was a lease in perpetuity, violative of the allotting statute as an alienation and being a subterfuge with the intent to violate the Act of June 7, 1897, *supra*, in obtaining a mining lease upon said restricted Quapaw Indian lands for a term in excess of ten years provided for therein. This was conceded because the trial court had in numerous suits instituted by the Government cancelled mining leases upon Quapaw Indian lands because of this same defect, the court being of the opinion that the lease was void *in toto*, as being an attempt to secure possession of these Indian lands by subterfuge in violation of law. The trial court held that the execution of mortgage and release thereof did not constitute a removal of restrictions and ordered the mining lease of plaintiffs made to Hopper cancelled because it was void on account of its term being in excess of the time permitted for leasing said lands.

On appeal therefrom the Circuit Court of Appeals reversed the trial court, in an opinion set forth at length in Record, pages 17 to 28. The Circuit Court of Appeals took the view that the Hopper lease, while being for a term in excess of ten years, it was a divisible term and sustained the lease for ten years. This court will observe, in reading the opinion of the Circuit Court of Appeals herein, that no reference therein is made to the Indian feature of this question, and no discussion is had by the court as to the effect of the opinion of this court in *U. S.* v. *Noble*, 237 U. S. 74, in which this court discusses the powers of a Quapaw Indian to make mining leases.

Pursuant to the mandate of the Circuit Court of Appeals the cause was sent back to the District Court for answer of the de-

fendant and trial thereon. The defendant filed his answer (Record, pp. 46-55), among other things alleging that the Hopper lease claimed to be owned by the plaintiffs was never in fact delivered; that it was not true that the plaintiffs or their assignor, Dallas Hopper, entered into possession of said property immediately after the execution of said lease, but that in fact the Hopper lease had long been abandoned, the rentals had not been paid, and that the plaintiffs were not in fact the owners of said lease; that the plaintiffs and their assignor, Dallas Hopper, had for more than three years subsequent to the execution of the Hopper lease considered same abandoned and made no attempt until more than three years after the execution thereof to enter upon the premises described in said lease and attempt to carry out any of the obligations imposed therein with reference to mining; that the defendant in the fall of 1912 and early in the year of 1913 secured a mining lease from the allottee, Leander J. Fish, upon the whole of his allotment, containing 200 acres, and including therein and as a part thereof the 120 acres described in the lease of plaintiffs' assignor, Hopper; that the defendant, Smith, took possession of said property, moved prospect drills thereon, and opened up large and valuable ore deposits; that at least $40,000 had been expended by said defendant in prospecting and developing these lands in question prior to the filing of suit herein, and that at the time of filing answer herein there had been expended by defendant, Smith, and his tenants at least $175,000 in prospecting and developing lands under his lease, and there had been produced more than $800,000 worth of lead and zinc ores under the lease of defendant prior to the filing of answer herein; that the defendant was drilling and prospecting this land continuously from the date of his lease thereon and on the 5th day of May, 1915, more than three years after the execution of the Hopper lease, this defendant made a discovery of a valuable deposit of lead and zinc ores on the lands in question, and this information became public, and shortly thereafter the said Hopper and his assignees commenced to assert rights for the first time under their claimed lease; that said Hopper and these plaintiffs thereafter assigned small interests in said Hopper lease to a large number of persons for nominal consideration, and these transactions were in such large numbers that it was clear that the plain-

tiffs and their assignor were claiming their lease right for no other purpose than to speculate thereon, and did not claim to own same so far as maintaining the right to mine this land; that shortly after the discovery of this ore deposit by the defendant in May, 1915, the said Hopper and his assignees, plaintiffs herein, from time to time would move upon some isolated part of said tract of land and sink shallow holes thereon, abandon same, and later repeat such action, but at no time showed any good faith attempt to claim any right under their lease by drilling in good faith with a view of discovering ore upon said land.

The defendant attached to his answer (Record, 16-21) copies of the leases under which he had expended such large sums of money, and caused ore to be produced therefrom.

Upon a trial of this cause it developed that there were numerous interests in the Hopper lease assigned to parties not claiming any right therein or joining in this proceeding, and after the court announced its findings in favor of plaintiffs there was filed an application by some of these outside interests, including the attorneys representing the plaintiffs, to be made parties plaintiff and share in the relief granted (Record, 58). This application was granted by the court.

Upon a trial of this case it appeared that the allegation of the plaintiffs quoted hereinbefore, that upon the execution of the Hopper lease possession of said land was immediately taken and prospecting for ores thereon had been done continuously, was false, and this allegation of the complaint was admitted to be false by Hopper and plaintiff McCullough (Record, 91-92). It was admitted that there was no attempt made by the plaintiffs or their assignor to take possession, or do any work whatsoever under said lease upon said land for more than three years after the date of execution thereof, and that they relied entirely upon the payment of "lieu money" of five cents per acre per annum as a full compliance with the covenants of lessee in said Hopper lease (Record, 91-92). At the time of the trial it was developed by testimony, unattacked and unquestioned, that there had been expended by defendant Smith and his tenants approximately $40,000 for prospect drilling alone, and there had been erected a large concentrating plant upon the lands involved in this litigation, and a mine opened thereon

with an additional expenditure of $150,000, making a total expenditure by the defendant and his tenants on the lands involved herein of approximately $190,000. It was further developed in the trial that plaintiffs McCullough and Landrum, after the filing of the suit herein and on the 29th day of September, 1916, had filed a suit in the District Court of Ottawa County, Oklahoma, wherein this land is located, against this same defendant, Wesley M. Smith, claiming an interest in the two mining leases on the allotment of Leander J. Fish (the same two leases under which the defendant bases his defense herein). In this proceeding in the state court, filed within two months after the filing of suit in the case at bar McCullough and his associates charged in their petition filed in said state court proceeding, that they were interested in a sublease executed by said defendant Smith upon the entire 200-acre tract of the Fish allotment (including the 120 acres involved herein) and charged that they and their associates under such sublease developed and discovered the ore bodies on said Fish land and asked the judgment of the court for an accounting against this defendant Smith, claiming the right under said sublease to an interest in the royalties on all ores mined *and to be mined* and sold from said tract of 200 acres. The petition filed in said state court proceedings was introduced in evidence at the trial of this cause and is found Record, pages 271 to 281. The court will observe this petition is verified by McCullough and as a part thereof attaches as exhibits the leases in which he was seeking an interest, the very leases which he and his associates in this proceeding in the case at bar seek to have cancelled and declared void, and as against the same defendant. This record (page 319 to 320) discloses at the time of the trial of this case at bar, McCullough and his associates in the state court proceeding and against this same defendant, were pressing their claims as to an interest in the leases claimed by defendant by prosecuting an appeal from the District Court of Ottawa County, Oklahoma, to the Supreme Court of the state, and that same was then pending and undetermined.

We here have McCullough and his associates prosecuting a cause in the state courts against Smith, defendant herein, seeking to have him declared trustee for them and that an accounting be adjudged against Smith in their behalf as to all ores mined and

sold to date of accounting, *and to decree to them an interest in future production*, and all upon the theory that they were part-owners and interested in the two identical mining leases executed by Leander J. Fish to Wesley M. Smith, defendant herein, and at the same time they were prosecuting a suit (the case at bar) in a Federal District Court, claiming the two mining leases of Smith set forth in his answer herein were void and inferior to rights acquired by them by assignment of the Hopper lease. In other words, they seek in the state proceedings to require an accounting for production under the Smith leases and to adjudicate their interest in future production thereunder, and in the other proceeding, pending herein, they seek to destroy and have cancelled the same identical leases on the theory they are void and in conflict with rights afterward acquired by them. Of course if they are successful in this proceeding in this court they will then require an accounting for ores produced by Smith under leases cancelled as directed by the District Court herein. This would enable a party to mulct the same person twice for the same production in different courts and upon clearly conflicting and inconsistent claims.

The District Court found the issues in favor of the plaintiffs and directed that the Smith leases be cancelled. Defendant Smith appealed from the decision of the trial court to the Eighth Circuit Court of Appeals, and the Circuit Court of Appeals affirmed the judgment of the trial court in an opinion, Record, 335-340. The defendant in due and proper time perfected his appeal to this court.

The contentions of the defendant are:

1. The lease under which plaintiffs claim (Hopper lease) is an entire contract and attempts to vest an estate in perpetuity, and, being against the policy of the Government, it is void.

2. The lease is not a lease in possession as defined by the Supreme Court of the United States in the case of *U. S.* v. *Noble*, *supra*, and is therefore void.

3. The lease violates not only the Act of March 2, 1895, *supra*, restricting alienation, but the Act of June 7, 1897, *supra*, authorizing mining leases, and violates the policy of the Government toward the Indian, and no title under such lease can vest in the lessee.

4. That the plaintiffs by their proceeding in the State Court of Ottawa County, Oklahoma, asserting the validity of and part ownership in the Smith leases, are estopped in a court of equity from attacking the validity of the Smith leases relied upon herein by defendant.

5. The lease claimed by plaintiffs was abandoned because no work was done thereunder for more than three years after the execution of said lease and because of failure thereafter to attempt in good faith to mine said land, and as evidence of their abandonment the record discloses such a large number of undivided interests being sold that it is impossible from this record to determine where the ownership of the Hopper lease lies today.

6. That the plaintiffs are estopped by reason of their long delay in standing by and permitting defendant herein to expend such large sums of money in developing this property, and this should be the rule particularly when applied to a business so full of hazard and risk as that incident to mining.

The above are the principal points contended for herein by defendant, and in presenting same we may not follow the order stated.

ASSIGNMENTS OF ERROR.

I.

The District Court and the Circuit Court of Appeals erred in holding and decreeing that appellees' mining lease dated April 29, 1912, and executed by Leander J. Fish, a Quapaw Indian, upon his allotted lands, was valid, and that the terms and provisions thereof challenged by appellant are not in violation of the Act of Congress of the United States approved March 2, 1895 (28 Stats. p. 927), and the Act of Congress of the United States approved June 7, 1897 (30 Stats. 72).

This lease, while for a term of ten years from date, contains the further grant:

> "If oil, mineral or any other substance of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals or other substance of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease."

Said judgment and decree is erroneous because:

> (a) The lease grants a term in perpetuity and is therefore void as against the restraint upon alienation imposed by Act of Congress of March 2, 1895, *supra*, and in excess of the power conferred by the leasing statute, Act of Congress approved June 7, 1897, *supra*.
>
> (b) The lease grant in perpetuity violates the policy of the Government of the United States toward its Indian wards generally, and particularly the Quapaw Indians, as expressed in said statutes.

The lease further contains the following provision:

> "The party of the second part agrees to begin operations on the above described premises within ninety days after the date of this lease; in case such operations do not begin during said stated time said second party agrees to pay to said first party five cents per acre yearly for each and every acre con-

tained in this lease, in lieu of said work, so long as they or their heirs desire to operate or hold the same."

The decree is erroneous because:

(a) This last mentioned paragraph invalidates the lease because it was an unauthorized exercise of the power to lease granted the Quapaw Indian by the Act of Congress of June 7, 1897, *supra*. It was not within the power of the Quapaw Indian to execute a lease for mining containing a clause that would enable the lessee to hold his land for even a ten year term for speculative purposes for the mere pittance of five cents per acre annually in lieu of work and thereby empower the lessee to prevent mineral development for the entire term if he chose so to do.

II.

The court erred in holding that the petition filed herein stated facts entitling appellees to relief in equity and directing that the motion to dismiss filed by appellant be overruled because the basis of the cause of action plead was the lease made by Leander J. Fish, a Quapaw Indian, and it was void for the reasons assigned in Assignment No. 1.

III.

The court erred in its conclusions herein upon the following facts disclosed by the record:

The appellees herein base their rights to recover herein upon their ownership in a certain mining lease executed by Leander J. Fish, a Quapaw restricted Indian, to Dallas Hopper, their assignor, and dated April 29, 1912, and seek to cancel two certain leases made by the same Indian allottee to the appellant, Wesley M. Smith, dated November 4, 1912, and January 6, 1913, respectively, because said leases are inferior to the lease made to Dallas Hopper and are therefore void. This record discloses that on September 29, 1916, the appellees and their assignors began a suit in the District Court of Ottawa County, Oklahoma, against this appellant and other persons, charging: that this appellant held two certain mining leases on the lands involved, dated November 4, 1912, and January 6, 1913 (same leases sought to be canceled herein, and

including the lands in the Dallas Hopper lease owned by the appellees) and in said suit copies of said leases are set out, and further charged that the appellant herein, Wesley M. Smith, made an oral sublease to the plaintiffs in said suit in said state court in the summer of 1913, and that under said sublease they had expended money in prospecting said land for minerals as the sublessee of this appellant, and that in pursuance of said sublease they discovered a large body of lead and zinc ore, and that thereafter this appellant entered into a conspiracy with his co-defendants in said state court proceedings to deprive plaintiffs in that suit of any interest in said property, and that the said Wesley M. Smith, appellant herein, thereupon executed a sublease in writing to L. C. Church, and J. S. Mabon, on the entire 200 acres of said allotment (which includes the lands involved herein) and further charged that under said written sublease made to said L. C. Church and J. S. Mabon a large amount of ores had been mined and sold, in which the plaintiffs therein and the appellees herein had an interest, and that a large amount of royalties had been derived from these operations, and prayed that the court decree them to have such interest, that an accounting be had, and they be given judgment for their interest in such royalties, and that they be decreed a certain interest in the royalties to accrue during the term of the subleases made to L. C. Church and J. S. Mabon; that the case in the state court was tried and appellant herein obtained judgment in said suit and the plaintiffs therein appealed said cause to the Supreme Court of the State of Oklahoma, where same was affirmed; that said appeal was pending and being prosecuted by the appellees herein at the time of the trial of this cause in the District Court at Muskogee, Oklahoma. The court erred in its judgment and decree for the appellees herein and holding that the claim of the appellees in the state court as sublesses under the appellant herein, Wesley M. Smith, was not inconsistent with their claim in the case at bar, where they seek to destroy and have canceled the leases of the appellant, Wesley M. Smith, and in refusing to hold that it was a complete estoppel as against said appellees and conduct which should bar them from relief herein.

IV.

The court erred in not permitting this appellant to file an amendment to his answer charging more in detail the fact of such state court proceeding, after the evidence had been admitted and the appellees herein had admitted that such allegation of proceeding in the state court was correct.

V.

The court erred in rendering judgment for the appellees because:

The appellees in the trial of this cause admitted that they had never entered upon or taken possession of said property for more than three years after the date thereof, but relied upon their payment of five cents per acre yearly to hold said lease. This was error, because the appellees by such admission accepted the alternative in the lease of paying money in lieu of work and gave full force and effect to such provision of said lease contrary to the Act of Congress of June 7, 1897, *supra,* which is the leasing statute conferring power upon the Quapaw Indian to make mining leases and is contrary to the policy of the United States Government toward its Indian wards, and is beyond the power of the Quapaw Indian to bind his land and his heirs thereto, to follow.

VI.

The court erred in its judgment and decree in holding that the lease claimed by the appellees is not a lease to commence *in futuro* as condemned by the Supreme Court of the United States in *United States* v. *Noble,* 237 U. S. 74.

VII.

The court erred in rendering judgment for the appellees and in sustaining their lease for the reason that said lease does not obligate the lessees to work or mine said land, but does permit said lessees to pay five cents per acre yearly in lieu of work so long as they desire to operate or hold the same, and this unilateral contract is not binding upon the Quapaw allottee and is void because it is inequitable and beyond the power of the Quapaw lessee to so bind his land pursuant to the Acts of Congress heretofore referred to

and is contrary to the policy of the Government of the United States in its dealings toward the Quapaw Indians.

VIII.

The court erred in finding that the appellees or their assignor had paid five cents per acre annually for the three year period before they claim to have taken possession of said land.

IX.

The court erred in finding that the appellees have acquired by assignment the mining lease executed by the Quapaw allottee on April 29, 1912, to Dallas Hopper, for the reason that this record does not disclose that these appellees have acquired the whole interest in said lease.

X.

The court erred in finding and adjudging all the issues in the case for the appellees against this appellant and granting the relief prayed for, because the evidence does not sustain such finding and judgment and should have been for the appellant.

XI.

The court erred in failing to find that the appellees had abandoned their lease by failing for more than three years to perform any of the covenants to prospect and mine under said lease and by their conduct in buying and selling interests therein for nominal consideration.

XII.

The court erred in permitting appellees to add additional parties after the trial had been had.

XIII.

The court erred in its judgment decreeing relief to the appellees and quieting their title against the appellant herein for the reason that the appellees were not in possession of said lands or any part thereof at the time of the institution of the suit or subsequent

thereto, and the court as a court of equity did not obtain jurisdiction to quiet title when the appellees were out of possession and the appellant was in possession of the lands involved herein.

XIV.

The court erred in its judgment in cancelling the leases of this appellant and refusing to sustain the validity and superiority of appellant's leases and in refusing to quiet his title as prayed for in his answer and cross bill. This was error because the lease of the appellees was invalid and void for the reasons heretofore assigned.

XV.

The court erred in its judgment for the appellees and in refusing to deny relief to said appellees because of their false pleading in alleging that they took immediate possession of said land upon the execution of their said lease and worked continuously thereunder by prospecting, drilling and developing the ore bodies thereon. The evidence discloses that the appellees admitted, and do not dispute, that they made no attempt to take possession or do anything upon this property for a period of more than three years after the execution of said lease. The judgment was erroneous in refusing to hold that a court of equity would grant no relief to parties guilty of such conduct in a court of equity.

BRIEF AND ARGUMENT.

I.

The District Court and the Circuit Court of Appeals erred in holding and decreeing that plaintiffs' mining lease, dated April 29, 1912, and executed by Leander J. Fish, a Quapaw Indian, on his allotted lands, was valid and that the terms and provisions thereof challenged by defendant are not in violation of the Act of Congress of the United States approved March 2, 1895 (28 Stats. p. 927) and the Act of Congress of the United States approved June 7, 1897 (30 Stats. 72).

There are two Acts of Congress involved—the Act of March 2, 1895 (28 Stats. 907), reading:

> "Be It Enacted, etc., that the allotments of land made to the Quapaw Indians in the Indian Territory in pursuance of an Act of the Quapaw National Council approved March 23, 1893, be, and the same is hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior; Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of the Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior: Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of the Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior; and the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith; Provided, said allotments shall be inalienable for the period of twenty-five years from and after the date of said patents."

And the Act of Congress approved June 7, 1897 (30 Stats., 72), reading:

> "That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands or any part thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining and business purposes; and said allottees and their lessees

and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary: Provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

The opinion of this court in *United States* v. *Noble et al.*, 237 U. S., page 74, is an important opinion in the determination of this controversy, for in the Noble case this court was determining the powers of a Quapaw Indian in leasing his land for mining purposes under the two above quoted Acts of Congress.

The lease under which plaintiffs claim is an entire contract and attempts to vest an estate in perpetuity, and being against the policy of the Government is void.

The writing in controversy (Record, 8-10) provides:

"The said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part receipt of which is hereby acknowledged, in consideration of the rents or royalties, undertakings and agreements hereinafter stated to be paid and performed by the said party of the second part, his successors, assigns, and sub-lessees, does by these presents demise and lease unto the party of the second part, successors and assigns, and sublessees the following described tracts or parcels of land, viz:" (Then follows the description of the land.)

"* * * for the term of ten years from the date hereof, for the purpose of prospecting, mining, drilling, boring or digging for oil, gas, asphaltum, lead, zinc, coal and copper and all and every other kind or kinds of valuable minerals, ore, fossil, or vegetable substance whatever."

Also, giving to the lessee the right to use so much of the surface of the land as might be properly needed to successfully conduct said prospecting and mining operations, and also providing for right of way over the lands for lines of railroad and pipe lines, and to erect necessary and proper buildings.

Then, the writing provides that if ore or other valuable substances shall not be found in any well drilled, the lessee agrees to leave said well in good shape for water, the first party to pay for the casing.

The lease then provides:

> "If oil, mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease."

This is the granting part of the lease, and is all-descriptive of the rights and privileges which the lessor—Indian—attempts to grant to the lessee—white man. It is altogether one grant. And immediately upon ore being discovered in paying quantities the grant takes effect *in perpetuity*, and the right passes from the lessor —Indian—to the lessee—white man.

There is nothing to be done by the lessor to make any further grant, or to perfect the grant in perpetuity; and no act is to be done by the lessee—white man—in order that the grant may attach.

It is not an agreement for a renewal lease for any term, and no other instruments are necessary to make the interest granted perpetual. It is neither an agreement for a renewal of the lease nor a covenant for a new lease.

Then follows the covenants of the lessee (Record 9), and these covenants in the writing are expressed as follows:

> "In consideration of which" (that is, all of the grants theretofore contained in the instrument; the right to prospect and mine and the use of the surface of the land, the use of building stone, the grant for right of way of the land for buildings, refineries, machinery, pipe lines, etc., including the provision in the lease that if oil, mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease) "the said party of the second part agrees and binds his executors, administrators, assigns, and sub-lessees to pay or cause to be paid to the party of the first part, his executors, administrators, or assigns, at Miami, Oklahoma, a sum of money equal to 5% per centum of the market value at the place mined or produced, of all oil, gas, asphaltum, lead, (sinc), coal, copper and all other minerals or substances whatever, which may be mined or removed by the said party of

the second part," etc. Payments to be on or before the 15th day of each calendar month during the continuance of the lease.

Then follows the writing that the lessee will exercise diligence in conducting said prospecting and mining operations, and that he will keep an accurate account of all ore mined, etc. And this is the extent of the obligations under the writing on the part of the lessee —white man—to the lessor—Indian. And, as expressed in the writing, the consideration for these covenants running from the lessee—white man—to the lessor—Indian, are all of the grants and all of the privileges contained in the writing, running from the lessor—Indian—to the lessee—white man, including the grant *in perpetuity*.

These provisions of the writing clearly makes this an entire contract. It is a single grant of several privileges, the right to prospect and mine, and rights incidental thereto, running from the Indian lessor to the white man—lessee, including the perpetual right for which the white man—lessee—agrees to prosecute the work of prospecting and mining diligently, and to make the payment of royalties; a single grant of several privileges and rights for one purpose, for a single consideration of so much royalty, the right to exist in perpetuity, conditioned, *only* that mineral shall be discovered in paying quantities.

The white man, however, was not satisfied with the Indian's grant, and did not desire to be bound by his covenants to diligently prospect and mine the land and pay the royalties, so the white man introduced into this lease the further provision:

> "The party of the second part hereby agrees to begin operations on the above described premises within 90 days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5c per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same."

It is not our purpose, under this sub-division of the brief, to discuss this clause of the lease. We will do that elsewhere; and merely refer to this clause here in order that the court will understand that we are fairly construing this contract as it exists within the four corners of the lease.

In any lease for mining purposes, with provisions for prospecting and discovery of minerals, when it is found that ore does not exist in paying quantities, the lease ends, and becomes void, and no longer binding either upon the lessor or lessee.

Of course, the lessee, when prospecting is once commenced has the right to diligently continue such prospecting until it is demonstrated that no ore exists in paying quantities. And when he ceases prospecting the lease ends, and is no longer binding upon either the lessor or lessee.

Eaton et al. v. *Allegany, etc. Co.*, 122 N. Y. 416. In the opinion at page 422 *et seq.*, the court said:

> "Undoubtedly the lessees had the right of possession so long as they, in good faith, were engaged in boring wells or testing the oil-producing capacity of the land. But when it was demonstrated that oil could not be obtained, or when they should abandon their search, their right to possess the property would end and thereafter they would have no more right to occupy it than a stranger."

In *Conkling* v. *Krandusky*, 112 N. Y. S. 13, the first, second, fourth and sixth syllabus state the law as follows:

> "The owner of land in 1893 executed an oil lease thereof to G., for the term of 15 years or as long as oil should be found in paying quantities. G., in pursuance of the terms of the lease, drilled a well and finished it in 1894, but found no oil in paying quantities, and in the same year took away his machinery and rigging used in drilling, leaving only the casing in the well, and did nothing further in the matter until 1905, after the owner, in 1904, had executed another oil lease of the land to plaintiff, when G. put down another well on the premises. Held, that the evidence showed as a matter of law that G. had abandoned his lease before the execution of the lease to plaintiff."
>
> "2. Where an oil lease is executed for a term of 15 years, or as long as oil is found in paying quantities, and the lessee, after drilling a well and failing to find oil in paying quantities, removes his machinery from the premises and does nothing more under the lease for 11 years, the granting of another lease of the same premises is a declaration on the part of the owner that she regards the outstanding lease as terminated."

"4. Oil leases or contracts stand on an entirely different basis from any other leasehold agreements, as the work which is to be done is ordinarily experimental and speculative, and, if oil is not found, no estate vests in the lessee."

"6. An oil lease provided that the lessee should begin operations at a specified time, or, in lieu thereof, pay a rental of $10 per month from that date, with the option at any time to surrender his lease and be released from all unfulfilled conditions. The lessee failed to commence operations at the time specified, and paid the first month's rental of $10, but thereafter for more than two months he ceased to pay and made no attempt to bore for oil. Held, that, as in the lease time was the controlling factor the failure to enter the premises or to pay the $10 per month was an abandonment of the lease."

And in the opinion, at page 17, it is said:

"Oil leases or contracts stand on an entirely different basis from any other leasehold agreements. The work which is to be done is ordinarily experimental and speculative. If oil is not found, no estate vests in the lessee. Eaton Case, cited *supra; Venture Oil Company* v. *Fretts,* 152 Pa. 451; 25 Atl. 732; *Kennedy* v. *Crawford,* 138 Pa. 561; 21 Atl. 19. While, ordinarily, forfeiture or abandonment is not looked upon with favor, that rule is not applicable to these oil leases."

While leases for solid minerals and oil and gas leases are not, in all respects, to be construed as the same, yet insofar as the principles applying to one lease applies to leases of the other character, they are identical.

The distinction generally applied is as stated in Mr. White on Mines and Mining Remedies, Section 164, as follows:

"In leases of the solid minerals, as in deeds and other contracts, where the rights of the parties, as to the subject-matter, are co-equal, the courts construe the language used in a way to favor the lessee, grantee or obligee, and follow the interpretation against the lessor, grantor, or obligor. But a different rule of construction applies to leases for oil and gas and on account of the peculiar nature of the mineral and the great tendency of such fluids to escape and the resulting injury to the lessor from drainage by means of adjoining wells, such leases are construed most strongly against the lessee and in favor of the lessor."

See *Crawford* v. *Ritchey,* 43 West Virginia, 58, 27 S. E. 223.

In *Browning* v. *Boswell,* 215 Fed., in the opinion at page 835, the court said:

> "But it may be said that a coal lease is different from one for oil and gas. Only in degree and not in principle. The courts have held them to be analogous, as see *Starn* v. *Huffman,* 62 W. Va. 422, at page 426, 59 S. E. 179, at page 180, where it is said:
>
> 'It is true * * * that more diligence is required in oil and gas leases than leases for other minerals; yet the same general principles prevail.'
>
> See, also, *Rorer Iron Co.* v. *Trout,* 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Cowan* v. *Bradford Iron Co.,* 83 Va. 547, 3 S. E. 120, where the distinction between mining leases of this character and sales of mineral outright are very clearly drawn by the Supreme Court of the state from which this Browning case comes to us."

That the lease is an entire contract would seem to be clear from its terms.

The court, however, in its opinion holds the contract to be divisible on the theory necessarily that the provision for the ten year term, under the provision of the lease, could be severed from the provision granting the estate in perpetuity.

In the case of *Allegheny Oil Co.* v. *Snyder,* 106 Fed. 764, which is cited by the court upon another point, was a case in which the lease contained this provision:

> "To have and to hold the same unto the lessee, his heirs and assigns, for the term of two years from the date hereof, and as long thereafter as oil or gas is found in paying quantities thereon, not exceeding in the whole the term of twenty-five years from the date hereof."

The question in this case was as to the construction of this lease. In the opinion at page 766, the court says:

> "As we read this instrument, applying the familiar rule that all parts of it must be given effect if possible, and the intention of the parties gathered from the four corners of the instrument, we find it to be a lease of a certain tract of land for the purpose of removing oil and gas therefrom, together

with certain privileges to enable the lessee to reach and remove the same from the premises."

* * * * * * * * *

"By the terms of the habendum clause the lessee is to enjoy the estate for the term of two years, and as long thereafter as oil and gas are found in paying quantities on the premises, not exceeding 25 years, in the whole, from the date thereof, for which the lessee is to render to the lessor one-eighth part of the oil, etc."

The lease further provided:

"In case no well is drilled on said premises within two years from the date hereof, the lease shall become null and void, unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter."

The opinion then states:

"That is to say, the lessee is given two years, within which to drill, which privilege he may extend by the payment for further delay at the rate of one dollar per acre at or before the end of the following year."

"It is claimed that the consideration of one dollar may support the grant of the two-year term, but the privilege of extending the same beyond the term of two years is supported by no consideration and is entirely at the option of the lessee, and, before it can become a binding agreement, requires an engagement upon the part of the lessee to pay the stipulated sum of one dollar per acre. We are unable to agree with this construction, although this interpretation is supported by a decision of the Circuit Court of Ohio for the Seventh Judicial Circuit, in the case of *Brown and Myers* v. *Ohio Oil Co., et al.*,"

which case the U. S. District Court of Appeals refused to follow.

In discussing the question here, the court said:

"This construction undertakes to divide the lease into independent parts, and annuls the effect of the privilege granted to the lessee of continuing the right to drill a well upon payment of the annual sum stipulated. We are of opinion that this lease constituted an entire contract, and that the consideration recited supports not only the grant of the two-years' term, but, as well, the privilege of extending the time of drilling, by paying the stipulated price therefor."

In the opinion filed in the case at bar, it is asserted that one dollar is a valuable consideration, and that neither party to the contract can show that the same was not paid. The consideration, therefore, in the case at bar, was the one dollar in hand paid, *and the covenants to prospect, mine and pay royalties.* This consideration of one dollar constitutes a consideration with the other covenants for the entire grant, and runs, the same to the provision constituting a perpetual grant as it does to any other part of the grant made by the Indian lessor to the white man lessee.

The court, in *Allegheny Oil Co., supra,* at page 767, continuing, has this to say:

> "This instrument is a contract. Assuming now that it is free from fraud, and between parties capable of contracting, it can be supported by the consideration of one dollar as well as any other valuable consideration. It is an indivisible agreement. Each part of it must be given effect. We can add nothing to it and take nothing from it. For the consideration named the lessee received a conveyance of the term, as we have already stated, with a stipulation that the lease should become void unless delay in sinking a well within the term of the lease should be paid for at the rate of one dollar per acre at the end of two years. This privilege is not to be separated from the other conditions of the lease. It is one of its terms, and must be given force and effect."
>
> *Bishop* v. *Palmer,* 146 Mass. 469, 474.
>
> Same case, 16 N. E. 299.

Now, here in the case at bar the grants are all for a specific purpose, and if mineral is found in paying quantities the grant becomes perpetual. The grant runs from the Indian lessor to the white man lessee as one grant, and the consideration of one dollar and the agreement to pay royalties is likewise a consideration for the entire grant. The promises on the part of the lessor and the covenants of the lessee are inter-dependent.

Mr. Elliott, in his work on Contracts, Section 1453, states the law as follows:

> "A contract is entire when its terms, nature and purposes show that it is contemplated and intended that each and all of its parts, material provisions and the consideration are common each to the other and inter-dependent. A divisible contract is one which from its nature and purposes is sus-

> ceptible of division and apportionment and has two or more parts in respect to matters and things embraced by it, and not necessarily dependent on each other, *and the parties do not intend that they shall be.* * * * Whether or not the contract is entire or divisible depends on the intention of the parties. The intention is to be ascertained from the language used, the subject-matter of the contract and from a consideration of all the circumstances."

The construction of the contract is based upon the assumption that the parties are *sui juris,* and have unlimited power of contract with relation to their property and engagements, without any consideration of any question of public policy, or the fact that the lessor in this case is a Quapaw Indian, without any power of alienation, except the power to lease, as provided by the statute.

Under the authorities cited, the writing is an entire contract and must be enforced as such and construed as such, and there can be no doubt but what if this were a contract between parties *sui juris,* the contract would be valid and binding as a perpetual lease, and the grant of the right to mine and remove ores from the land in question *in perpetuity.*

The real consideration in this Hopper lease is agreement to mine and pay royalty, which is an executory, not an executed, promise, "for while the sum of one dollar is *technically a valuable, it is only nominal, consideration."*

Huggins v. *Daley,* 99 Federal 609.

In the opinion filed, the court, in considering the Hopper lease, overlooked and failed to take into consideration the fact that such lease was executed under a special grant of power, and that the contract between the Indian and Hopper is governed and controlled by the restrictions and limitations of such grant, and not by the usual rules governing the execution of contracts between parties *sui juris.*

The Act of Congress, March 2, 1895, 28 Stats. 907, provides as follows:

> "Provided, that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

The Leasing Act of June 7, 1897, 30 Stats. 72, among other things, provides as follows:

> "That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years, for farming or grazing purposes, or ten years for mining or business purposes."

And immediately following in said section, it is provided:

> "And said allottees, and their lessees and tenants, shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary."

The Act also contains the following provision:

> "If any such allottee cannot improve or manage his allotment properly and *with benefit to himself* the same may be leased, in the discretion of the Secretary, upon such terms and conditions as shall be prescribed by him."

These provisions express the intention of Congress that the leases granted shall be working leases, and of such a character as to produce a benefit to the Indian grantor.

The further provision that, if any such allottee cannot improve or manage his allotment properly and with benefit to himself, etc., further emphasizes the legislative intent that the power granted shall be for the benefit of the Indian as the primary purpose of the Act, and gives full recognition to the governmental guardianship over the Indian.

The policy of the Government towards the Indian and the care which the courts take to protect his rights, appears in numerous decisions of the Federal Court.

In construing the Act of March 2, 1895, and of June 7, 1897, the case of *United States* v. *Noble*, 237 U. S. 74, the Supreme Court referred to the restriction statute by this statement:

> "It put it beyond the power of him or of them to alienate the land or any interest therein in any manner, except as permitted by Acts of 1896 and 1897."

And this language is followed by the statement that:

> "The comprehensiveness of the restriction was modified only by the power to lease; and while the allottee could make leases as provided in these acts, *they give him no power* to dispose of his interest in the land subject to the lease, *or of any part of it.*"

And recognizing the difference between a lease executed under this power and a lease between parties *sui juris,* and not restrained by statute, the court further says:

> "It is true that the owner of the reversion, when unrestricted in his right to convey, may sever the rent and grant it separately, but *this is by virtue of his freedom to deal with the estate in the land.*"

The court was there discussing the power to make leases to take effect in the future, or concurrent leases having the effect of passing, by way of assignment, the royalties received by the Indian from his leased land.

Again, in the opinion, it was further stated:

> "It necessarily follows that the allottee in the present case, having no power to convey his estate in the land, could not pass title to that part of it which consisted of the rents and royalties."

The court, also, in the Noble Case, in discussing the claim made by counsel that Congress, in dealing with the Indians, was adopting the policy of gradually releasing them from guardianship and preparing them for complete independence; and that Congress has, by Act of June 7, 1897, in pursuance of that policy, authorized leases for ten years; and that the lease in controversy in that case was for ten years and no longer, and was, therefore, within the authority, and that however wise it might have been to prohibit overlapping leases, Congress did not so provide.

The court, discussing this suggestion of counsel, has this to say:

> "We are of the opinion that this is too short a view. The question is as to the scope of the authority given by Congress; that is, whether it did not extend simply to leases in possession, which should be taken not to include 'leases in

> reversion.' The allottee, as we have seen, is under an absolute restriction with respect to his reversion for the period of twenty-five years from the date of his patent. In the light of this restriction, and of the governmental purpose which induced it, there is sound reason for construing the power as not authorizing anything more than a lease in possession as well understood in the law."

The court, in summing the matter up, used the following language:

> "It necessarily follows that the allottee in the present case, having no power to convey his estate in the land, could not pass title to that part of it which consisted of the rents and royalties."

The expression in the opinion in the case at bar that the lease of Fish to Hopper vested an estate in the ore in place, contravenes the principles announced by the Supreme Court in the Noble Case. But we will discuss this question hereafter.

In the Noble Case, the court held the power of a life-tenant to grant leases, as the analogy by which to measure the grant of power to the Quapaw Indians to lease their lands for mining purposes, under the Act of 1897; and, held, that, while the statute does not expressly prohibit leases by the Indians to take effect in the future, yet, that the courts will read into the statute an implied prohibition against the power of a Quapaw Indian to make any lease on his land to begin *in futuro*.

The case as a whole, expresses and enforces the policy of the Government towards the Indian.

In the case of *United States* v. *Allen*, 179 Federal 13, the court was dealing with Indian restricted lands, and stated the rule that, in all these transactions between an Indian and a white man affecting Indian restricted lands, the policy of the Government of the United States towards the Indian was the guiding star that should be ever kept in mind, saying:

> "To attempt to cramp these large governmental measures to the narrow limits of a real estate transaction is to deprive them of their distinctive character."

The court, in the opinion filed in the case at bar, has done the very thing that is condemned in the case of *United States* v. *Allen*.

The limitations contained in the Act of 1895, and upon the power conferred by Act of 1897, is not confined to the Indian, for it was said, in the Allen case, that:

> "Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indians. It violates the governmental rights of the United States."

The Leasing Act, June 7, 1897, should be read as a proviso to the prior restriction Act of March 2, 1895.

The character of lease which the Indian can make to the white man, under the authority conferred, is limited and restricted to and within the express power conferred on the Indian by the Act of June 7, 1897.

In the Noble case, it is said:

> "The restriction was removed only to the extent specified; otherwise the prohibition against alienation remained absolute."

The purpose of the grant of power to lease points the character of a contract the Indian may make. The Indian can make no contract conveying his land. The only contracts he can make are contracts for mining purposes.

There are many rules governing the law of real property, and other contracts, imbedded in our jurisprudence, which are not applicable to any contracts made with the Indian relating to his restricted lands. The court, in the case at bar, applied the rules of law that control contracts between parties *sui juris*. Any contract made by an Indian with relation to his restricted lands, in excess of the power conferred, is void.

An attempted conveyance made by way of lease, or any instrument by whatever name called, that conveys an estate in the land in perpetuity, is void.

Any conveyance by deed of his land, in violation of the restrictions, is void, and passes no title to the grantee.

And where an Indian makes a conveyance of his land by warranty, and afterwards acquires title to the same, the statute of the state providing that, under such warranty, the after-acquired title shall pass to his vendee, does not apply.

Monson v. *Simonson,* 231 U. S. 341.
Starr v. *Long Jim,* 227 U. S. 613.

At page 624 in the case of *Starr* v. *Long Jim, supra,* the court says:

> "As to the effect of the warranty upon the after-acquired title, while the general rule is that a conveyance with warranty estops the grantor, when he afterwards becomes the owner of the land assumed to be granted, to deny the grantee's title (Bigelow Estop., 2d Ed., p. 324, etc.), it is well settled that the doctrine does not apply to the case of a conveyance made by one *non sui juris,* or that is contrary to public policy or statutory prohibition."

This was also decided in the case of *United States* v. *Allen, supra;* and conveyances made by the Indians in violation of restraint upon alienation were held void.

The same is true of the case of *United States* v. *Heckman,* 224 U. S. 438.

The policy of the United States to confine white men, in dealing with the Indians strictly within the power granted, in all matters relating to their restricted lands, not only visits any infraction of the policy to the usual results of a contract that violates the spirit or letter of the statute, but goes further and broadens the spirit and purpose of the Act by consideration of the Government's policy to protect the Indian; and declaring all acts void that contravene this governmental policy.

In *Heckman* v. *United States,* 224 U. S., at page 438, is this statement:

> "It was the intent of Congress that, for their sustenance, and as a fitting aid to their progress, they should be secure in their possession during the period specified, and should actually hold and enjoy the allotted lands."

Again, on page 446, the court said:

> "The allottee may be permitted to bring his own action, or if so brought the United States may aid him in its conduct."

And again:

> "Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation; otherwise, if the Indian grantor had squandered the money he would lose the land which Congress had intended he should hold, and the very incompetence and thriftlessness, which were the occasion for the measures for his protection would render them of no avail."
>
> "Those who deal with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute."

Generally speaking, the power to make leases being statutory must be construed strictly independent of the question of the fiduciary relation between the Government and the Indian.

In Wood on Landlord and Tenant, Section 168, page 234, it is stated:

> "Where powers are derived under a statute, whether general or special, the extent of the power, as well as the rules and directions for its execution, must be sought for in, and must conform to, the statute."

And in 2 Pomeroy Equity Jurisprudence, Sec. 834, p. 799, it is stated:

> "The defective execution of statutory powers, in the failure to comply with the prescribed requisites, cannot be aided by equity."

And in *Moreau* v. *Detchemendy*, 18 Mo. 522, 531:

> "Courts of equity do not carry into effect, by their decrees, the incomplete execution of statutory powers."

And in *Gridley's Heirs* v. *Phillips*, 5 Kans. 349, 354, it is stated:

> "This was an effort on the part of the court to carry into effect an incomplete execution of statutory power, which it could not do. *Bright* v. *Boyd*, 1 Story, 478-487, and cases there cited."

And in *Williams* v. *Cudd*, 2 S. E. 14 (S. Car.), it is stated:

> "The defective execution of statutory powers, in the failure to comply with the prescribed requisites, cannot be aided in equity. 2 Pom. Eq. Jur., Sec. 284, and numerous authorities in note."

And in Sec. 177, 1 Story on Equity Jurisprudence:

> "And there are other cases of the defective execution of powers where equity will not interfere; as for instance, in regard to powers which are in their own nature statutable, where equity must follow the law, be the consideration ever so meritorious."

But even the requirement to keep strictly within the power granted by Act of Congress to make leases is not the only limitation here, for this rule must be construed, and probably modified, by the further consideration that the governmental policy is to make leases for the benefit of the Indian who exercised the power.

On the question of the governmental policy to protect the Indian in his rights, and the care with which the courts enforce this policy in order to protect the Indian's rights, and to prevent the Indian from being over-reached, the case of *Sage* v. *Hampe*, 235 U. S. 99, is an instructive case. The court, at page 105, commenting upon the agreements sought to be enforced in that case, has this to say:

> "It called for an act that could not be done at the time and it tended to lead the defendant to induce the Indian owner to attempt what the law for his own good forbade. Such contracts, if upheld, might be made by parties nearly connected with the Indian and strongly tend by indirection to induce him to deprive himself of rights that the law seeks to protect."

This was a case where two white citizens of Kansas contracted with each other to trade or exchange farms, one of the farms being in Ottawa County, Oklahoma, and the other in Kansas; the Oklahoma farm being restricted land, but subject to sale by consent of the Secretary of the Interior. The Oklahoma farm owner breached the contract, and a suit for damages was sustained by the Supreme Court of Kansas, but on writ of error, the Supreme Court, of the United States, reversed the case and held that no action

could be maintained on the contract, for the reason that any recognition of any validity in the contract might have a tendency to induce the Indian to make a contract forbidden by law, saying:

> "A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. *Kalem Co.* v. *Harper Brothers,* 222 U. S. 55, 63. And more broadly it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit. *Providence Tool Co.* v. *Norris,* 2 Wall. 45; *Trist* v. *Child,* 21 Wall. 441; *Oscanyan* v. *Winchester Repeating Arms Co.,* 103 U. S. 261; *Fuller* v. *Dame,* 18 Pick. 472. It appears to us that this is a contract of that class."

The court closed its opinion by stating:

> "But the policy involved here is the policy of the United States. It is not a matter that the states can regard or disregard at their will. There can be no question that the United States can make its prohibitions binding upon others than Indians to the extent necessary effectively to carry its policy out, and therefore, as on the grounds that we have indicated the contract contravenes the policy of the law, there is no reason why the laws should not be read, if necessary, as broad enough to embrace it in terms."

The presence of the stipulation for the perpetual right to mine this Indian's land, and which was procured to be inserted in the lease by the white man, and to which the Indian submitted, would require the Indian to go into the courts at the expiration of the term of ten years to have the lease cancelled and set aside on the ground that the clause is contrary to the statute.

And when it is reflected that it is a matter of common knowledge and history that the lead and zinc mining in the Quapaw Indian Reservation District is an extension of lead and zinc mining under leases in the adjacent Missouri district, where a perpetual mining lease is unknown, although mining has been carried on extensively for more than forty years, it cannot be supposed that the Indian who would enter into such an improvident and unreasonable contract would go into the courts for the purpose of securing the cancellation of this lease at the expiration of the ten year period, but it is rather to be supposed that, not knowing that such stipula-

tion was void, as a matter of law, he would submit to the perpetuation of his lease and deprive himself of the large royalties which are paid on these mining lands after they have been opened under a first ten year lease.

In the language of the court in the case of *United States* v. *Allen, supra,* page 16:

> "If they are unable to resist the arguments by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own act?
>
> "To ask these questions is to answer them."
>
> "Congress intended that both the Indians and the members of the white race should obey its limitations."

(And the further statement in that case:

> "A transfer of the allotments is not simply a violation of the proprietary rights of the Indians; it violates the governmental rights of the United States.")

So that, there being present in this lease a stipulation interdependent with other stipulations that violate both the proprietary rights of the Indian and the governmental rights of the United States, as well as the provisions of the Leasing Act, there ought not to be any hesitancy in declaring the lease utterly void *in toto*.

These cases declare the governmental policy towards the Indian. And the writing, on its face, is a single grant of the right to prospect and mine, and the use of the land for purposes only incidental thereto, for which grant the lessee—white man—agreed to pay certain royalties, makes this an entire contract. And being against the policy of the Government, there is no room to apply the distinction made by the court in the case at bar, at page 13 of the opinion, where it is stated, that:

> "The rule is that when a part of a divisible grant or contract is *ultra vires* or illegal, but not *malum in se,* and the remainder is lawful, the latter may be sustained and enforced unless it appears from a consideration of the whole grant or contract that it would not have been made without the part which is *ultra vires* or illegal."

Any violation of the governmental policy towards the Indian, by which any conveyance of his land is obtained, under all of the cases, is void.

Any violation of the governmental policy as firmly established as the policy of the Government towards the Indian, stands before the law as condemned to the same extent as if such act was the commission of a criminal offense, and because not moral, *malum in se.*

And whether such contracts are severable or not, where the unlawful element enters into the consideration, or the grant, the contract is condemned and is void.

In *Sheppey* v. *Stevens,* 185 Fed. 147, 153, the court said:

> "Still, contracts which are illegal because of their tendency to promote unlawful acts are not made lawful because of the improbability of the unlawful acts being done. *Egerton* v. *Brownlow,* 4 H. L. Cas. 1."

In *Robinson* v. *Mutual etc. Co.,* 182 Fed. 850, 857, it is said:

> "The policies make no reference whatever to the special renewal contracts, but both contracts are to be read together, and, so read, show that these exceptants received advantages not mentioned in their policies, which were not received by other insurants in the same class and of equal expectation of life. The transaction in both these respects violated the express provisions of the law of New Jersey (Act March 19, 1895, 2 Gen. St. p. 1783). Therefore the contract is void and to be treated as non-existent, and the exceptants are entitled to recover premiums paid as moneys had and received to their use."

In re Johnson, 224 Fed. at page 87, the court cites *Hazelton* v. *Sheckells,* 202 U. S. 71; *Miller* v. *Ammon,* 145 U. S. 421; *Gibbs* v. *Gas Co.,* 130 U. S. 396; *Grover* v. *Zook,* 87 Pac. 638; *Horseman* v. *Horseman,* 72 Pac. 698. and *Potter* v. *Potter,* 72 Pac. 702, and states:

> "These were all cases where the contract in question was not severable; where there was no measure by which to gauge the illegal part of the consideration as against that which was undertaken to be performed. The distinction between such a contract and one such as here involved is plainly indicated in the last two cases, is one of which the opinion was written by Judge Wolverton and the other by Judge Bean."

And these two cases furnish a splendid illustration of the reasons why the stipulation we are discussing cannot be considered

as divisible from the other parts of this lease, under the rule that separates the legal from the illegal in contracts of this character.

The headnote in the case of *Horseman* v. *Horseman, supra,* reads, as follows:

> "Where a member of a firm agreed to convey his interest in the firm, together with a homestead entry, on which he had not made final proof, for a specified sum, the contract was not severable, and, being void in so far as it related to the homestead, was unenforceable *in toto.*"

In the opinion, at page 702, it is stated:

> "A contract may be said to be entire, when, by its terms, nature and purpose, it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. A divisible contract is one in its nature and purposes susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor intended by the parties to be so. *Id.* By the present contract the property was sold in a mass, for the lump consideration of $4,250, without specific designation or agreement as to the value of particular items thereof, each and all of its parts being common to each other and interdependent, so that it is clearly an entire contract, within the definition above given. For a case of marked analogy, see *Wehrung* v. *Denham* (Or.), 71 Pac. 133."

In the case of *Potter* v. *Potter, supra,* the headnote reads:

> "A contract by which, on payment of $5,000, a husband agrees to convey certain land to his wife, provided that papers shall be executed so that she release her dower interest in certain land of his, and he release his curtesy in certain land of hers, is entire, so that, being void as to the latter provisions, the first part cannot be specifically enforced."

And in the opinion at page 704, it is said:

> "But when by the terms of the contract, or its nature and purpose, it is contemplated and intended that each and all of the parts and provisions shall be dependent upon each other, and not separate and distinct, the contract must be regarded as entire and indivisible."

Guided by precedents, the stipulations in this contract rendered the lease perpetual and the stipulation whereby the lessee might hold the property for the whole ten years by paying the pittance of five cents per acre, six dollars per acre, or sixty dollars for the entire term, is not divisible and cannot be separated from the other covenants and conditions in the lease contract.

Just here we venture to suggest that when it is considered that this is a hundred and twenty acres of land, that the whole consideration which, by the contract, Hopper and his assigns were required to pay in order to hold the land, would not have sustained this one Indian, and prevented him from actually starving to death; that in the face of the policy of the Government to so legislate as to enable the Indian to gain a support in the rents and profits issuing out of his land by keeping and retaining the title for the whole twenty-five years, it ought to be adjudged that on its face the lease is contrary to public policy, *because it shows that an undue and fraudulent advantage* was taken by the white man of this Indian ward of the Nation.

As to a stipulation in a lease having a similar effect, but between parties *sui juris*, it was said, in *Rorer Iron Co.* v. *Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285, 294:

> "And certain it is, they were the inducements by which the lease was obtained. Nor are they in conflict with anything in the written instrument of lease. The lease was for a term of 20 years; yet looking to its nature and object, it cannot be contended that the lessees had the option to work or not to work the ore mines for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessors into a mere barren encumbrance on his land, a cloud on his title, an incubus and a manacle which would oppress him and destroy the marketable value of his land. No lease of land for a rent, for a return to the landlord out of the land which passes, can be construed to be intended to enable the tenant merely to hold the lease for purposes of speculation, without doing and performing in connection therewith what the lease contemplated. Such a construction would indeed make all such contracts a snare for the entrapment and injury of the unwary land-owner. A man buying and paying for land may do with it as he likes—work it, or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion; he must perform what he

stipulated to do; and if he has obtained the lease by misrepresentation and fraud, the lessor may have it rescinded in equity. For these reasons, this assignment is untenable."

Absent possession and work in 90 days, and equity would cancel this lease upon the ground that, by this stipulation, the Indian lessor was overreached and defrauded, for the policy of the United States, as expressed in *United States* v. *Noble,* requires such Indian lease to be fair in their terms towards the Indian.

Judge Van Devanter, in *Choctaw, etc. R. R. Co.* v. *Bond,* 160 Fed. 403, was dealing with the contract between the parties *sui juris.* The court admits that the lease of the land for reservoir for thirty years was void; by the contract for the purchase of the house and lot, the price being stated in the contract could be separated from the illegal and permitted a recovery for the house and lot. In stating the rule as to severable contracts, it was said:

"Conceding, for present purposes only, that the stipulation relating to the 30-year lease was void, still that does not affect the railroad company's obligation to pay for the houses; for it does not admit of doubt that, when a contract consists of distinct agreements, each founded upon a distinct consideration, it is to be regarded as divisible; and, if one of the considerations be illegal, that alone does not invalidate the entire contract, but only the agreement founded thereon and the others may be enforced." * * * "As before said, the transfer of the houses and the procurement of the reservoir site were distinct transactions, and a distinct sum was to be paid for each."

In the case at bar, the entire grant is in perpetuity. The right created *at the inception of the lease* is to continue so long as oil or gas is found in paying quantities. The entire grant, therefore, being contrary to the statute, is void.

In *Lingle* v. *Snyder,* 8th Circuit, 160 Fed. 627, the plaintiff had made a lease which included Government lands that he was not entitled to enclose by fence, and lands which he owned and was entitled to fence. The lease provided for the payment of a gross sum as rent for the whole tract. The lease showed the number of acres that the defendant was entitled to fence or rent from the plaintiff, and the number of acres which he was not entitled to

fence or to rent to the defendant, and the proportion per acre was a mere matter of mathematical calculation, but the court refused to separate the legal from the illegal, and held the entire contract void.

The contracts were not two separate instruments, but this was held not to prevent the application of the rule that a part of one entire contract being illegal avoids the whole.

The court at page 628 says:

> "The rental was not apportioned and no method of apportionment was suggested by the language employed. The various stipulations describing what plaintiff leased and what defendant was to do and pay in return were mutual and dependent covenants of a single contract. They did not relate to independent, disconnected transactions, and there is no rule by which a court can distribute them and allot to each item of leased property a portion of the single rental sum. For aught that appears the right to use the large body of public land said to have been unlawfully fenced by plaintiff may have been the principal, if not the sole, inducement to defendant to enter into the contract relation. Without it the remainder might not have served his purpose, and he might not have desired to lease it at all."

Taking the contract in the case at bar by the four corners it is entirely reasonable to say that this Indian, without the stipulation for the perpetual lease, and for the payment of the five cents per acre, would not have leased the land and entered into the contract here involved. The writing is not ambiguous; it is clear in its terms. The grant and the covenants are interdependent.

Judge Van Devanter in the opinion at page 630, further says:

> "True, the contract before us embraced lands lawfully owned and fences lawfully maintained by plaintiff, all of which he had the right to lease, but who can say that regarding them alone the parties would ever have contracted at all, or if so upon what terms and conditions? If legal and illegal stipulations in a contract are independent and divisible the latter may be excluded and the former enforced, but when the parties have woven them together into a single agreement a court of justice will not unravel the good from the bad. This doctrine has come down from an early day." Citing numerous numerous authorities.

How can this court say that, eliminating the stipulations—the stipulation for the five cents per acre yearly, enabling Hopper and his assigns to hold the land for ten years, and the stipulation for the right to perpetually mine the land—the parties to this lease would have made the contract just as it would stand *without these stipulations?* They are contained in the lease and express the intentions of the parties; the language is not ambiguous and there is no room for construction. They have woven the stipulations together in one instrument as one contract.

It is said in the authorities which we here have cited that whether a contract is severable or not is to be determined by the intention of the parties and the intention of the parties here is clearly expressed in the contract, and condemns the transaction as violative of the positive statute; violative of the policy of the Government.

Hazelton v. *Sheckells,* 202 U. S. at page 71, in the opinion at page 78:

> "Every part of the consideration goes equally to the whole promise and therefore, if any part of it is contrary to public policy the whole falls."

In the case of *Trist* v. *Child,* 21 Wallace, 441, the Fifth syllabus states the law as follows:

> "Though compensation can be recovered for these when they stand by themselves, yet when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that part which is bad destroys the good. Compensation can be recovered for no part."

The opinion at page 448, quotes from the statement of Lord Mansfield in the case of *Jones* v. *Randall,* 1 Cowper, 39, as follows:

> "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

And then Justice Swayne continues:

> "It is a rule of the common law of universal application, that where a contract express or implied is tainted by either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice."

In the case of *Commissioners of Sedgwick County* v. *The State,* 66 Kan. 634, the second syllabus states the law as follows:

> "Where an unlawful contract for the furnishing of material, for a fixed sum, is united with a contract otherwise valid, for the performing of certain services, upon a stated basis of compensation, and such basis is fixed with reference to the unlawful portion of the contract, and is made more favorable to the contractor by reason thereof, the entire contract is invalid."

In the opinion at page 641 the court say:

> "Upon its face the contract is divisible. It provides for the furnishing of a set of books at a stated price, and for the making of certain later entries at an agreed rate. But the evidence of the plaintiff in error shows that the books as received from Heiserman were not completed to January 1, 1888, as the contract required, and that he brought them down to that date, as he had intended doing, at his own expense, since he paid Heiserman the full amount he received from the county, and that he made this apparently improvident arrangement because he expected to get his compensation for this from the work that followed." * * * "Upon the theory of plaintiff in error, therefore, the rate referred to was presumably increased on account of the terms of the first part of the contract; at all events, it was established with reference to it.
>
> "This consideration links together the two parts of the contract, and the illegality of either part prevents the enforcement of the other."

In the case of *Flersheim* v. *Cary,* 39 Kan. 178. Syllabus of the case is as follows:

> "Where a chattel mortgage is given to F. and Co. on certain personal property, including intoxicating liquors, and afterward the mortgagor sells all of said mortgaged property except the intoxicating liquors to C., and C., as a part consideration therefor, agrees to pay the mortgage debt to F. & Co., held, that such mortgage is void, and C. is not estopped from denying its validity by reason of his agreement to pay the mortgage debt."

In the opinion at page 180 the courts say:

> "This question is no longer an open one in this state. This court, in *Korman* v. *Henry,* 32 Kas. 49, and *Gerlach* v.

> *Skinner,* 34 *id.* 86, held, that where a chattel mortgage was given on property and included intoxicating liquors, it was void; and that it was not only void as to the liquor, but as to all the property contained in said mortgage."

And the court held this mortgage void notwithstanding the fact that the payment of it was assumed by the purchaser of the property mortgaged, not including the intoxicating liquors.

In the case of *McNamara* v. *Gargett,* 68 Mich. 454, the Fourth syllabus is as follows:

> "If any part of the consideration of a contract is *illegal,* the *entire* consideration is *void,* because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal."

In the opinion at page 460 the court quotes from Greenhood on public policy as follows:

> "By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law. The strength of every contract lies in the power of the promisee to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at public expense; the courts will never, therefore, recognize any transaction which, in its object, operation, or tendency is calculated to be prejudicial to the public welfare."

And also at the same page quotes from Story on Contracts as follows:

> "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any decree of exactness. It has never been defined by the courts, but has been left loose and grew from definition in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy."

In the case at bar there is a Governmental policy toward the Indian, which by this contract is violated, and as the courts have held all contracts with Indians in violation of this policy void, it is not too much to say that the court should hold this contract void.

In the case of *Miller* v. *Ammon,* 145 U. S. at page 421, the second syllabus states the law as follows:

> "The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."

In the opinion at page 426, the court say:

> "The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."

The only exception to the rule stated is expressed by the court whether or not the prescribing of a penalty for the doing of the act renders the act void, and quoting from *Pangborn* v. *Westlake,* 36 Ia. 546, 549, the test is stated as follows:

> "We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly."

In the case at bar, the statute that pronounces the act void, declares a public policy of the Government toward the Indian and on all occasions where the questions have been presented to the court, they have held contracts, conveyances and dealings of every character between the Indian and the white man void where they contravene the statutes enacted for the protection of the Indian.

In the case of *Gerlach* v. *Skinner,* 34 Kans. 86, in the opinion at 89 *et seq.* the court say:

"Where a part of a consideration of an entire contract is illegal, the contract is tainted and the courts will not compel its performance. 'You shall not stipulate for iniquity; all writers upon our law agree in this: No polluted hand shall touch the pure fountains of justice.' (*Collins* v. *Blanton,* 2 Wils. 341.) The policy of the law is to leave the parties in all such cases without remedy against each other; the courts will not lend their aid to a party who founds his cause of action upon an immoral or illegal act. If, from a plaintiff's own statement, or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of the state, there the court says he has no right to be assisted. (Wharton on Contracts, paragraph 340; *Korman* v. *Henry,* 32 Kas. 49, 343.)"

In the case of *South Penn Oil Company* v. *Snodgrass,* 76 Southeastern. 961; same case 43 L. R. A. N. S. 848, in the opinion of L. R. A. at 861 the court in discussing the perpetual clause in the contract has this to say:

"It is essentially an extension, not a creative, clause. It does not start a new term or tenancy. Unless the qualifying clause, 'as oil or gas is produced,' alters the nature of the tenancy or estate, it remains what it was within the term, a right to take out the oil, burdened with the duty to exercise diligence, skill, and good faith in the discharge thereof. If there is any alteration of the character of the estate, it arises by implication, for there is no express alteration of it."

In the case of *Clark against Barnes,* 76 N. Y. 301, the syllabus of the case is as follows:

"Under the provision of the State Constitution (Art. 1, paragraph 14), declaring that 'No lease * * * of agricultural land for a longer period than twelve years * * * shall be valid,' a lease for a longer period is not valid for twelve years, but is void *in toto.*

Where, in pursuance of a written agreement, two leases of the same premises were executed at the same time, upon the same consideration and terms, and as parts of the same transaction, one for eight and the other for twelve years, beginning at the expiration of the first term, held (Church, Ch. J. dissenting), that the two leases were to be construed together, as if contained in the same instrument, and were void; and that summary proceedings by the lessor to remove the lessee were maintainable."

In the opinion at page 304, the court say:

> "It is provided in section 14 of Article 1 of the constitution that 'no lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid.' This provision condemns all leases for a longer period than twelve years. A lease for a longer period than that would not be valid for twelve years, but the lease itself would be void *in toto*. It is not provided that no lease shall be valid for a longer term than twelve years; but the provision is that the kind of lease described shall be invalid. Hence if this had been one lease for twenty years, it would unquestionably have been void. But the claim is that, as neither of these leases is for a longer period than twelve years, the constitution has not been violated. But both leases were executed, in pursuance of a written agreement, at the same time, upon the same consideration, as parts of the same transaction, and were upon precisely the same terms; and they may, therefore, be construed together, as if they were contained in the same instrument. If the leasing had been by one instrument, for these two terms, it would not be disputed that, within the meaning of the constitution, there would have been a lease for twenty years; and the effect is the same, and the construction must be the same, under the circumstances disclosed here, although the agreement is witnessed by two instruments instead of one. Otherwise the whole policy of the constitutional provision could be defeated, by cutting a very long term up into successive short terms, by the use of separate instruments, all executed at the same time."

This case practically overrules the case of *Hart against Hart*, 22 Barber, 606, cited by the court in the case at bar, and the case is referred to in *Robertson* v. *Hayes*, Third Southern, 676 and bases its ruling upon the difference between the constitutional provision of New York and the statutory provision of Alabama. The Alabama provision is that a lease shall not be valid for a longer term than twenty years, whereas the New York provision is that no lease or grant on agricultural land for a longer period than twelve months hereafter made in which shall be reserved any rent or service of any kind, shall be valid.

The New York provision is a constitutional provision making the lease invalid. The Alabama provision is a statutory provision, making the term invalid.

The Act of Congress of 1895 is an absolute restraint upon alienation and under the Act of 1895 any conveyance or lease or instrument of any kind attempting to grant any interest in the land, leasehold or otherwise would be void.

The Act of 1897 merely relieved for the ten year period from the effect of this prohibitory statute and the two taken together in effect provides that any instrument or conveyance attempted to be made in violation of the authority conferred is void.

It seems to us that the Circuit Court of Appeals in considering this cause overlooked their holding in the case of *Muskogee Land Company* v. *Mullins*, 165 Fed. 179. In that case the allottee was permitted by Act of Congress to

> "rent their allotments for strictly non-mineral purposes for a term not to exceed one year for grazing purposes only, and for a period of not to exceed five years for agricultural purposes."

The Land Company, having acquired a lease right from the Indian, made a sub-lease thereon to Mullins, on its face purporting to be for agricultural purposes for a period of two years. The land was suitable for and used only for grazing purposes. Mullins remained in possession one year, vacated same, and refused to pay rent for the second year, and suit was brought for the rent. Here the lease for grazing purposes was authorized for only one year, and it was apparent to the court that the attempt was one to secure possession of the land for grazing purposes for a longer period than that allowed by statute. The court permitted the defendant to assert the invalidity of the lease, and said:

> "The Acts of Congress inaugurated a public policy specially applicable to wards of the nation, as the Indians, even after allotment, are held to be; and it is our duty to so apply the law as to subserve that policy so far as we may lawfully do so. * * * If the lease now in controversy between the Land Company and Mullins was not authorized by the owners of the land (the Creek Indians) in their contract with the Land Company, it was unwarranted, and constituted a violation of the spirit of the Act of Congress in question. If it was authorized by them it constituted a violation of the letter of the law and is void. *No mere circumlocution can be permitted to accomplish an ulterior and unlawful purpose.*"

We think the court clearly was right in *Land Company* v. *Mullins* in holding that an attempt to secure possession of these restricted Indian lands for a longer period than that authorized by law is a subterfuge and is violative of the governmental policy inaugurated for the benefit of its wards as expressed in the Act of March 2, 1895, and June 7, 1897, *supra.* We fail to see how the court could fail to follow the same rule in the case at bar.

The lease is not a lease in possession, as defined by the Supreme Court of the United States, in the case of United States vs. Noble, and is therefore void.

The validity of the lease is to be determined by its terms.

That is what the lessee is authorized to do under its terms, and what the lessor can require the lessee to do under its terms, and all the time keeping in mind the status of the parties.

Luhrig Coal Co. v. *Jones and Adams Co.,* 141 Fed. 617, 620.
McMullen v. *Hoffman,* 174 U. S. 639, 649.
Carlisle v. *Smith, et al.,* 234 Fed. 759, 761.
Hegness v. *Chilberg,* 224 Fed. 28, 37.
Pittsburg etc. Co. v. *Dredging Co.,* 139 Fed. 780, 783.

The lease contains the following provision:

> "Party of the second part hereby agrees to begin operations on the above described premises within ninety days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5c per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same."

The purpose of the mining lease is to secure to the lessee the right to prospect and mine upon the land for a definite term, and the purpose of making a mining lease by the lessor is to secure the mining operations, the prospecting and mining of ore and the payment of royalties, the benefit to the lessor being royalties to be paid on minerals discovered and removed.

The purpose of this lease, as expressed therein, is stated as follows:

> "For the purpose of prospecting, mining, drilling, boring, or digging for oil, gas, asphaltum, lead, zinc, coal and copper, and all and every other kind or kinds of valuable minerals, ores, fossil, or vegetable substances whatever."

This purpose of the lease under its terms is practically nullified, by the provision for delay and the above provision for the payment of five cents per acre yearly rental in lieu of work.

The only possession of the land under this instrument to which appellants were entitled, was a sufficient possesion of the surface of the land to enable them to carry out the purpose of the instrument, but they were not entitled to any other or greater possession.

If an Indian lease under a statutory power may specify ninety days within which to enter and begin work, and five cents per acre in lieu of work, after the expiration of ninety days, why may not the lease as well specify 120 days, or one year, or two years, or five years, or seven years? Why could not the Indian lease for ten years for the rental of five cents per acre in lieu of work, if the lessee did not work? And what would be the difference, in law or equity, between this contract and a contract whereby the Indian would agree with Dallas Hopper for a consideration of five cents an acre paid to him annually that he would not lease his land for a period of ten years to anyone except Hopper?

By the terms of the lease, whether the appellants should ever commence work of prospecting and mining was left entirely to the option of the lessee. The writing provided for ninety days' delay in taking possession of the land and prosecuting the work of mining.

As expressed, the lease therefore upon its face did not contemplate the commencement of mining operations until a future day, within ninety days, or by the payment of five cents per acre for ten years.

It is not within the authority of the Leasing Statute to grant a lease *in futuro*, or to make a lease to commence *in futuro* at the option of the lessee. The effect of the writing was to give the plaintiff an option to enter into possession of the mining rights and operate the prospecting and mining thereon at a time in the future, within ninety days, or, by paying five cents per acre they could postpone the taking of possession and the operating of mines and carrying on the mining business on the land during the entire ten years, and never enter into possession at all.

The authority of the Indian was to make leases by which he would enjoy the benefit of mining operations, and to obligate the lessee to mine and pay royalties, not to make contracts by which for a grossly inadequate sum the white man could hold his lands indefinitely for speculation and take possession and prospect and operate mines or not, at his pleasure. Such a lease is not a lease in possession.

It was the intention of Congress, by the Act of June 7, 1897, to grant to the Quapaw Indian a power to lease his land for the purpose of *mineral development,* during the limited period, so that he, and in the event of his death, his heir, *during such period,* should enjoy and be possessed of the benefits to be derived from the development and marketing of ores mined thereon. In *Heckman* v. *United States,* 224 U. S. at page 438, the court said:

> "It was the intent of Congress that, for their sustenance and as a fitting aid to their progress, they should be secure in their possession during the period specified and should actually hold and enjoy the allotted lands."

The test then to be applied is: Could Fish, or his heir, under the contract made, *enforce development* of the minerals beneath the surface so he, or they, might enjoy the benefits thereof in royalties *during the term?*

The application of the test develops and emphasizes the vice of the Hopper lease. Fish therein has not only contracted so he may not secure and enforce the development and enjoyment of his mineral estate, but has effectually placed in the hands of his lessee the power to prevent actual enjoyment thereof by paying the pittance of six dollars per annum, and by so doing, retaining the right to take possession of the allotment for the entire ten years by paying sixty dollars. If this be lawful, and within the Indian's power, could he not logically accept the sixty dollars in advance at the execution of the lease, thereby contracting away his right to have his lands developed for ten years? This would be a fraudulent use of the power. Fish might make his lease and accept the entire sixty dollars delay money at one time; and the remainderman mentioned in *United States* v. *Noble,* would certainly be deprived of the enjoyment of his estate and even to the enjoyment of a small annual delay payment. The fact that appellant alleges Hopper went into immediate possession does not satisfy this test. The answer to

this is: Fish could not have enforced such taking of possession, and neither could he have forfeited Hopper's right for his failure so to do. It is to be tested, as to whether it contravenes the governmental policy, by its language when made.

The development of minerals and the benefits accruing thereby to the Indian, under the Hopper contract, *is, at the option of the lessee.* This is not a lease in possession, viewed in the light of the governmental policy, as expressed in the Act of Congress of June 7, 1897.

In *United States* v. *Noble, 237* U. S. 74, the Act of 1897 authorizing the Quapaw Indians to make leases is held to be in the light of the restrictions and of governmental policy, as not authorizing anything more than a lease in possession, as well understood in the law. And in so holding, the Supreme Court adopted a construction of the statute that the authority conferred was to be construed by the same rules as the power of a life tenant to make leases at the common law, and quotes from Woodfall's Landlord and Tenant, page 239, as follows:

> "Upon a general power to make leases, without saying more, the law adjudged that leases ought to be leases in possession, and not leases in reversion, *or in futuro.*"

Citing with approval,

> *Shecomb* (*Slocum*) v. *Hawkins,* (1613) Cr. Jac. 318; 80 English Reprint, 145.

In that case,

> "The donee of the power, made lease for twenty-one years or three lives, rendering the ancient, etc., and demised two parts to B., for twenty-one years, and before that lease expired she made another lease to B. for 21 years, to commence after the former determined; and as to the third part of the land she made a lease of that for twenty-one years after the death of one Carne (who in fact never had any estate in the land), and died; the first lease expired, and J. the son entered, and demised to the plaintiff, and the defendant claimed under B., the lessee, and it was adjudged *'pro quer;'* for on such power she could not make a lease to commence at a day to come; but the lease ought to be in possession, *and not in entry* to commence *in futuro,* nor in reversion after another estate vested; but the law will adjudge on a general power to make leases, without any more, that they ought to be leases in possession."

The court also cites the case of *Countess of Sussex* v. *Wroth*, Cro. Eliz. 5; 78 English Reprint, 272.

A report of the case is as follows:

> "The case is, the land was assured by the Earl of Sussex, by Act of Parliament, to his wife for her jointure, the reversion in fee to the Earl of the manor of Burnham, with a proviso for the Earl to make leases for one and twenty years, rendering the ancient rent. The Earl makes a lease for one and twenty years, rendering etc., and before the end of it makes another lease by indenture to the lessee for one and twenty years bearing date 30th March, to commence at Michaelmas following. It was adjudged a void lease, because for the time it is a lease in reversion; and if he might make a lease to commence at the Michaelmas following, he might make it to commence twenty years after. The statute intended not to give him that liberty; and it being a liberty and power, it must be strictly pursued."

The court also cites the case of *Winter* v. *Loveday*, 1 Comyns 37; 92 English Reprint, 947. In the opinion at page 39, Holt, C. J. discussed the nature of a lease in reversion, and explained what was the nature of a lease in reversion, thus:

> "In the most ample sense, that is said to be a lease in reversion which hath its commencement at a future day, and then, it is opposed to a lease in possession; for every lease, that is not a lease in possession, in this sense, is said to be a lease in reversion."

And, again, at page 240, Woodfall says:

> "But if made to commence only a day after the execution of the lease, it was not good at common law or in equity as a lease in possession."

Citing,

Pollard v. *Greenvil*, (1662) 1 Ch. Cas. 10.
Doe d. Allen v. *Calvert*, (1802) 2 East 375; 102 English Reprint 413.
Bowes v. *East London Waterworks Co.*, (1821) Jac. 374; 37 English Reprint 873.

Again, at page 241, Woodfall says:

"but under a power to lease in possession and not in reversion, a lease for years executed on the 29th of March to the

then tenant in possession, to hold as to the arable land from the 13th of February preceding, and as to the pasture from the 5th of April then next, under a yearly rent payable quarterly on the 10th of July, 10th of October, 10th of January, and 10th of April, was held void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power."

Citing,

Doe d. Allen v. *Calvert,* (1802) 2 East 376.

At page 244, Mr. Woodfall says:

"All leases which are not to take effect in possession immediately, *but from a future day,* are considered as reversionary leases, within the meaning of powers to grant leases in possession and not in reversion."

Citing,

Winter v. *Loveday,* (1698) Comyn 37, 39; 2 Salk. 537.
Goodtitle v. *Funucan,* 2 Doug. 765; 99 English Reprint 357.

At page 245, Mr. Woodfall says:

"In legal acceptance a lease for years in reversion, and a future interest for years, are one and the same; a future lease and a lease in reversion are synonomous."

In Taylor's Landlord and Tenant, Vol. 1, Sec. 85, it is said:

"Possession is so important to the validity of a lease that if a disseisee wishes to lease land of which he is disseised, he can only deliver the deed as an escrow to take effect after he recovers possession. The deed will not operate, before entry, further than to transfer the lessor's right of entry—to take effect after his entry."

Citing:

Doe d. v. *Watts,* 9 East, 19; 103 English Reprint 478.
Jennings v. *Braggs,* Cro. Eliz. 447; 78 English Reprint 49.
Sharp v. *Sharp,* Cro. Eliz. 482; 78 English Reprint 734.

In Sugden on Powers, Vol. 2, page 310, the author says:

"It has been determined, that even a general power to lease for a certain number of years without expressing that

the leases shall be in possession, and not in reversion, authorizes leases in possession only, and not in reversion or *in futuro.*"

And again at page 308, the author says:

> "*In legal acceptance* a lease for years in reversion and a future interest for years are one and the same; a future lease and a lease in reversion are synonymous."

See, also, *Taussig* v. *Kiel,* 134 Mo. 530, cited and followed in *U. S.* v. *Noble, supra.*

Under the rules, as stated by Mr. Sugden and Mr. Woodfall, leases to commence at a time in the future and leases to commence at the expiration of an existing term, are synonymous. Under the authorities, a lease which authorizes the lessee to take possession at a future day, is not a lease in possession, and is void.

It is contrary to the policy of the Government toward the Indian. Upon its face and under the contract contained in the lease possession may be stayed for ten years, by paying a pitiful sum as rentals.

The writing shows on its face that it was not intended to be a genuine mining lease, but was intended to permit the plaintiff to hold this land for speculation.

The test then to be applied is: Could Fish, or his heir, under the contract made, *enforce development* of the minerals beneath the surface so he, or they, might enjoy the benefits thereof in royalties *during the term?*

The application of the test develops and emphasizes the vice of the Hopper lease. Fish thereon has *not only* contracted so he may not secure and enforce the development and enjoyment of his mineral estate, but has effectually placed in the hands of his lessee the power to prevent actual enjoyment thereof by paying the pittance of six dollars per annum, and by so doing retain the right to take possession of the allotment for the entire ten years by paying *sixty* dollars. If this be lawful and within the Indian's power, could he not logically accept the sixty dollars in advance at the execution of the lease, thereby contracting away his right to have his lands developed for ten years? This would be a fraudulent use of the power. Fish might make his lease and accept the entire sixty dollars delay money at one time; and the remainderman men-

tioned in *United States* v. *Noble,* would certainly be deprived of the enjoyment of his estate and even to the enjoyment of a small delay payment.

The development of minerals and the benefits accruing thereby to the Indian, under the Hopper contract, *is, at the option of the lessee.* This is not a lease in possession, viewed in the light of the governmental policy, as expressed in the Act of Congress of June 7, 1897.

In *United States* v. *Noble, supra,* the court said concerning these Quapaw Indians:

> "It was the intent of Congress that the allottees during the period of restriction (not Hopper) should be secure in their actual enjoyment of their interest in the land."

What interest? Certainly the mineral interest. Did they (Congress) contemplate that the Indian should or could make a contract that would *preclude* himself, or the remainderman—likewise himself "as a ward of the nation"—or his heirs as successors to such land at his death, from such "enjoyment"? Certainly not. And in the same case it is stated:

> "The practice (of taking one lease after another) to say the least, is an abnormal one, and it required no extended discussion to show that it would facilitate abuses in dealing with ignorant and inexperienced Indians." *U. S.* v. *Noble, supra.*

If taking a lease upon a lease is an abuse, what do we characterize the practice that prevents the Quapaw Indian or his heir from enforcing the mining of his land?

It was contended in the Noble case that the Indian was free to act as the white man and so long as he kept within the limit of ten years and made *a* mining lease he was within his authority.

The court said:

> "We are of the opinion that this is too short a view. * * * In the light of this restriction, and of the *Governmental policy* which induced it, there is sound reason for construing the power as not authorizing anything more than a lease in possession, as well understood in the law."

It is too short a view in any case where the exercise of the power is used to justify such a transaction as this record shows, and it is too short a view because it conflicts with the general policy of the Government toward the Indians independent of any restriction.

The Noble case showed a condition that was well nigh universal with the Quapaw lands, that is, many leases running concurrently with the royalties being purchased by white persons. This would certainly have pauperized the Indian although owning valuable mining lands and this condition no doubt was known to the court when considering the Noble case. The defendants there made the identical argument that is made here by plaintiffs that the leasing statute was a lifting of the restrictions for a period of ten years, an emancipation of the Quapaw Indian within such period for mining purposes and within such period the Indian could lease for mining purposes in all respects the same as a white unrestricted person. This argument was met by the solicitor with the theory that the leasing statute was a grant of legislative power to the Indian analogous to the power of a life tenant to lease for given purpose and term. The Supreme Court adopts this theory as a proper construction of the statute when the various treaty obligations of the Government toward the Quapaw are considered. The court said the contention of emancipation, etc., was too short a view.

A life tenant with a general power to lease for a given purpose and term, must and can only make a lease that calls for the best rental, but must also be fair to the remainderman and with usual covenants. If the life tenant were empowered to lease a building for business purposes for five years he could not lease for cash rental *all payable in advance.* And this is because he might die the first year of the lease having received the full rental for the full term and the estate would pass to the remainderman burdened with a lease fully paid for and the remainderman would not be "able to enjoy his estate" nor receive the rentals thereon. The life tenant cannot make such a contract as it is a fraud upon the person to follow. If the plaintiff's argument be sound "that the Quapaw Indian may deal within these limits as a white man" it logically follows that he may lease his land for mining for ten years

in the absence of fraud for a cash consideration of $1,000 and no royalty. This logical conclusion was foreseen by the court in denying the contention of the defendants. The court thereupon, we think, adopted the construction that will forever fully protect the Indian.

> "It was the intent of Congress that the allottees during the period of restriction should be secure in their actual enjoyment of their interest in the land."

The court here meant actual enjoyment of the *mineral estate*. It meant that the Indian could make only such a lease as would enable him or himself "as a ward of the nation" to *require* or *enforce* mining and the digging and the marketing of the ores beneath the surface so that the royalties might be enjoyed. A lease leaving it optional with the lessee whether or not he worked or mined does not satisfy. Such a lease made by a life tenant leasing under a general power is by all the authorities *void*. Such a lease robs the Indian of his power to *enforce mining*.

The Supreme Court knew the weakness of the Indian for money for immediate needs. A few thousand or even hundred dollars in cash will induce an average Indian to lease his land for a less royalty or with easier covenants to work than can be obtained without it. This is so even though the cash received would be a mere bagatelle as compared to the reduction in royalties. A life tenant leasing under a power cannot receive such a bonus as it defrauds his remainderman by reducing his royalty to accrue.

This construction of the Noble case if followed will make it impossible to impose upon the Quapaw Indian. It will require the utmost good faith in dealing with him, give him the ordinary and best rentals, and provide development, mining and enjoyment of his estate.

The lease of the plaintiff is repugnant to any such construction. Hopper *could* hold this land for ten years without any work (did for three years) by paying a nominal sum annually and successfully prevent the Indian for such term from receiving any benefits under the statute and prohibit any mining or development, of his land. This is not mining—it is speculation at the expense of the Indian.

The test is: Could the Indian have *enforced* development? He certainly could not in this case. This violates every principle governing the leasing of a life tenant and the governmental policy toward these Indians.

The protection afforded the Quapaw Indians by the restriction act and the leasing act as construed in the Noble case is only carrying out the treaty obligations with these Indians and the general policy of protecting Indians as a whole.

It could never have been the Governmental policy to allow white men to tie up the Indian restricted land so as to prevent mineral development for a mere cash pittance and speculate thereon for ten years. The Quapaw Indian is *non sui juris*. *Goodrum* v. *Buffalo*, 162 Fed. 817. The Government is his guardian and he is a ward of the nation. *U. S.* v. *Noble, supra*, and a lease or contract violating the announced policies are void.

The lease violates not only the Act of March 2, 1895, restricting alienation, but also the Act of June 7, 1897, authorizing mining leases, and violates the policy of the Government toward the Indian, and no title under such lease can vest in the lessee.

The Act of March 2, 1895—The Quapaw—28 U. S. Stats. 907, contains this provision:

> "Provided, that said allotment shall be inalienable for a period of twenty-five years from and after the date of said patents."

The Act of 1897, 30 U. S. Stats. 72, provides:

> "That the allottees of lands within the limits of the Quapaw agency, Indian Territory, are hereby authorized to lease their lands or any part thereof, for a term not exceeding * * * ten years, for mining or business purposes."

The purpose of the act is to authorize the Indian to lease his lands for mining purposes.

What mining purposes are is well understood.

The writing itself on its face shows that it is made:

> "For the purpose of prospecting, mining, drilling, boring or digging for oil, gas, asphaltum, lead, zinc, coal and copper, and all and every other kind or kinds of valuable

substances whatever, with the right to use as much of the surface of said land and so much of the building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations, also the right of way over and across said lands whereon to construct and operate such line or lines of railroad, as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery and pipe lines upon said premises, for successfully carrying on the business of boring, prospecting, mining and prosecuting the objects of this indenture, with the right to remove or sell and remove all of said buildings, refineries, machinery and pipe lines at any time, or at the expiration of this lease" (Transcript, p. 10).

The writing also further provides (Transcript, page 11):

"In consideration of which the said party of the second part agrees and binds his executors, administrators, assigns and sub-lessees to pay or cause to be paid to the party of the first part, his executors, administrators or assigns, at Miami, Oklahoma, a sum of money equal to 5% per centum of the market value at the place mined or produced, of all oil, gas, asphaltum, lead (sinc), coal, copper, and all other minerals, or substances whatever, which may be mined or removed by the said party of the second part, his executors, administrators, assigns, or sub-lessees from said land herein leased, and such payments, or royalties or rent shall be made on or before the 15th day of each calendar month during the continuance of this lease for all oil, gas, asphaltum, ore and mineral products and substances above named, mined or removed from the land during the calendar month last preceding such date of payment."

And again at page 11 of the transcript, it is provided:

"The party of the second part hereby agrees to begin operations on the above described premises within 90 days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5c per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same."

Laying aside the attempt on the part of the plaintiff to obtain from the Indian, in violation of the Statutes, a perpetual estate in the land, which we have heretofore discussed, this provision, if valid, enables the white man for a term of ten years to absolutely defeat the purposes of the lease and the purpose of the Leasing Statutes, and permits the white man to hold for speculation, for ten years, the entire tract.

No one can read this lease and the grant by the lessor and the covenants of the lessee, without gathering from the writing the intention of the parties to give to the white man a ten years' option, for the pittance of 5c per acre, to prosecute and mine this land, and in the event of ore being discovered in paying quantities to hold the land in perpetuity. Under the terms of the lease the white man could hold this entire tract for ten years by paying to the Indian in yearly installments of six dollars, and in the aggregate the sum of sixty dollars, without developing, without prospecting, without mining, without paying any royalties for minerals produced and removed from the land.

The Indian is *non sui juris*. The Government is his guardian. The Act of Congress permitting leasing was passed for the benefit of the Indian, not especially for the benefit of the white man.

This lease is to be construed by what the parties intended, and its legality is to be determined by what rights the Indian obtained under the lease, what rights he obtained under the lease that he could enforce, applying to this instrument the policy of the Government to protect the Indian in his rights. If the lease in its terms and provisions and the obligations resting upon the lessee are not in accordance with the purposes of the Government in authorizing the Indian to lease, then the lease is void, because any agreement between an Indian and a white man which violates the statutes and the policy of the Government is void.

If such an instrument (if valid) does not alienate for a mere pittance the mining rights upon this land, and the right to mine and operate the same for ten years without any power in the Indian lessor to compel the prospecting of said lands or the carrying on of mining operations thereon, then we fail to understand the English language.

It is no answer to this policy of the Government to say that "we have entered into possession of this land and are prospecting

and mining the same." If the lease contravenes the public policy of the Government, that fact avoids the lease.

That the Quapaw Indians are still the wards of the Government is declared in the case of *United States* v. *Noble*, 237 U. S. 74, in which case at page 79, the courts say:

> "The Quapaws are still under national tutelage. The Government maintains an agency and, pursuant to the treaty of May 13, 1833, 7 Stat. 424, an annual appropriation is made for education and other assistance (37 Stat. 530). In 1893, the Quapaw Nation Council made provision for allotments in severality which were to be subject to the action of Congress and in the act of ratification of 1895, Congress imposed the restriction upon alienation which has been quoted. The guardianship of the United States continues, notwithstanding the citizenship conferred upon the allottees (*United States* v. *Celestine*, 215 U. S. 278, 291; *Tiger* v. *Western Investment Co.*, 221 U. S. 315, 316; *Hallowell* v. *United States*, 221 U. S. 317, 324; *United States* v. *Sandoval*, 231 U. S. 28, 48)."

And again at page 81, the court says:

> "It was the intent of Congress that the allottees during the period of restriction should be secure in their actual enjoyment of their interest in the land. *Heckman* v. *United States, supra.* The restriction was removed only to the extent specified; otherwise, the prohibition against alienation remained absolute."

In the case of *Heckman* v. *United States*, 224 U. S. 413, in discussing the question of restrictions against alienation, at page 436, the court say:

> "The placing of restrictions upon the right of alienation was an essential part of the plain of individual allotment; and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented by the general Acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning. That the conferring of citizenship was in no wise inconsistent with the retention of control over the disposition of the allotted lands, was expressly decided in the case of *Tiger* v. *Western Investment Co., supra*, in which the conclusions of the court were thus stated (p. 316)."

And then follows the discussion of the case of *Tiger* v. *Western Investment Company,* which is a discussion of the policy of the Government towards the Indian.

And, again, at page 438, it is said:

> "It was the intent of Congress that, for their sustenance and as a fitting aid to their progress, they should be secure in their possession during the period specified and should actually hold and enjoy the allotted lands. As was well said by the court below, 'If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations."

The case of *United States* v. *Allen,* 179 Fed. 13, is another case expressing the policy of the Government toward the Indian.

In the opinion, at page 16, Judge Amidon, in discussing this policy and the title of the Five Civilized Tribes to their lands, has this to say:

> "To attempt to cramp these large governmental measures to the narrow limits of a real estate transaction is to deprive them of their distinctive character. And yet much of the argument contained in the briefs, as well as the opinion of the trial court, treats these measures as a matter between grantor and grantee, and, wherever they do not fit the private law of real property, they are declared to be ineffective."

Again, at page 17, in discussing the alienation by the Indians of their allotments, it is said:

> "Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indians. It violates the governmental rights of the United States."

Any act by an Indian in violation of restrictions on alienation are void.

In the case of *Munson* v. *Simonson,* 231 U. S. 341, the syllabus of the case is as follows:

"Restrictions on alienation imposed by Section 5 of the Act of February 8, 1887, 24 Stat. 388, on an allotment to a Sisseton and Wahpeton Indian remained until the actual issuing of patent carrying full and unrestricted title, and were not removed instantly on its passage by an Act of Congress permitting the Secretary of the Interior to issue such a patent. * * *

"A deed of an Indian of an allotment subject to restrictions on alienation is absolutely void if made before final patent, even if made after passage of an Act of Congress permitting the Secretary of Interior to issue such patent; nor does the unrestricted title subsequently acquired by the allottee under the patent inure to the benefit of the grantee.

"A state statute cannot make a deed the basis of subsequently acquired title to the Indian allotment lands when the Federal statute has pronounced such a deed entirely void."

In the case of *Starr* v. *Long Jim*, 227 U. S. 613, the last syllabus of the case, at page 614, is as follows:

"An allottee Indian, who conveys by warranty deed before patent and during the period of suspension of alienation without the consent of the Secretary, acts contrary to the policy of the law and is not estopped to deny the validity of the deed after patent and the grantee acquires no rights."

In the opinion at page 624, the court say:

"As to the effect of the warranty upon the after-acquired title, while the general rule is that a conveyance with warranty estops the grantor, when he afterwards becomes the owner of the land assumed to be granted, to deny the grantee's title (Bigelow on Estop., 2nd Ed., 324, etc.), it is well settled that the doctrine does not apply to the case of a conveyance made by one *non sui juris* or that is contrary to public policy or statutory prohibition."

In the case of *Trist* v. *Child*, 21 Wall. 441, which was a case involving a claim for personal services of an attorney, part of which claim was for legitimate professional services, and part of which were for lobby services, which are declared by the courts to be against public policy, and the court held that the entire claim for services was void, as against public policy. In the opinion, at page 448, in discussing this question, it is said:

"It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration *or the thing to be done,* no alleged right founded upon it can be enforced in a court of justice" (italics ours).

In the case of *Hazelton* v. *Sheckells,* 202 U. S. 71, the first syllabus states the rule as follows:

"Every part of the consideration for a contract goes equally to the whole promise, and if any part of it is contrary to public policy the whole promise falls."

In the opinion, at page 78, the court says:

"Every part of the consideration goes equally to the whole promise, and therefore, if any part of it is contrary to public policy, *the whole promise falls.*"

In *McMullen* v. *Hoffman,* 174 U. S. 639, was a suit for profits arising out of an illegal contract for the construction of certain improvements to the system of waterworks of the City of Portland. In the opinion at page 654, the court say:

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis.*"

In the case of *Sage* v. *Hampe,* 235 U. S. 99, this was a contract between two white men, one selling to the other a parcel of land that was an Indian allotment. The syllabus in part is as follows:

"The protection of the Indians in their title to allotments is the policy of the United States, and one that the states cannot regard or disregard at will.

"Where a contract affecting Indian lands might be held unenforceable as a matter of common law, but this court construes a Federal statute broadly so as to include such a contract within its prohibitions, this court has jurisdiction to review under Sec. 237, Judicial Code.

> "The United States can make its prohibitions on alienation of Indian allotments binding upon others than Indians to the extent necessary to carry out its policy of protecting the Indians in retaining title to the land allotted to them."

In the opinion, at page 105, the court say:

> "And more broadly it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit. *Providence Tool Co.* v. *Norris,* 2 Wall. 45; *Trist* v. *Child,* 21 Wall. 441; *Oscanyan* v. *Winchester Repeating Arms Co.,* 103 U. S. 261; *Fuller* v. *Dame,* 18 Pick. 472. It appears to us that this is a contract of that class. It called for an act that could not be done at the time and it tended to lead the defendants to induce the Indian owner to attempt what the law for his own good forbade. Such contracts if upheld might be made by parties nearly connected with the Indian and strongly tend by indirection to induce him to deprive himself of rights that the law seeks to protect."

These cases established the doctrine that contracts in violation of the restraints upon alienation by the Indians are void.

Here is a contract by which on its face and under its terms the white man can hold the Indian's lands for ten years, by the payment of a nominal price for exploitation and speculation. The Leasing Statute authorizes the leasing for mining purposes. The Indian has no right or authority to make leases or contracts by which another may hold the lands without giving to him the benefits of the purpose for which the statute was enacted. The lease therefore is void, and if the appellants are in possession they are in possession under a void lease and cannot maintain a suit to quiet their title thereunder.

Again:

The Leasing Statute construed by the United States Supreme Court, in *United States* v. *Noble, supra,* as being the grant of a power analogous to the power to lease of a life-tenant, should be read as a whole to determine the intent of the donor.

It provides that the Indian may give a lease for farming purposes or grazing purposes for a term not exceeding three years, and for mining purposes for a term not exceeding ten years.

The court, in the Noble case, has adopted a construction of the statute that would carry out the intent of the statute, to-wit: An enjoyment of the estate, whether it be farm or mineral, and as earnestly urged by the government in its brief in the Noble case, to enable the Indian to lease his land with a reservation of the rent, affording an *income during the term* for the benefit of the *heirs* as well as the allottee.

As applied to the case at bar, when Fish executed the lease to Hopper, was he—Fish—by his contract (assuming his land to be underlaid with valuable minerals) assured of an income during the term? Certainly not.

He, by his contract, tied his allotment for at least ten years and no income as contemplated by the statute assured to him or to his heirs.

Again, if he could accept cash rental in lieu of development from time to time, it follows, of course, that in the first instance and at date of contract, Fish, by accepting the nominal sum of sixty dollars would defeat the very purpose of the act, and he and his heirs to follow him would be deprived of that assured income that would follow development, and that was intended to be provided for the Indian by such Leasing Act.

The same Act of Congress and the same construction placed thereon by the court applied to farm leasing. Would it be seriously contended, at this date, that a Quapaw Indian could lease his allotment to A. for farming purposes for the full statutory period —three years—and accept the full rental for three years in cash in advance? If he may do this, what becomes of the doctrine of the Noble case, that he is exercising a power and leases made thereunder must be made with due regard to the rights of his heirs or remainderman. If he farm leased the land for the full period and took the full rental for three years in advance, and die the next day, would this not be a fraud upon, and take from, the heir or fictitious remainderman his assurance of an income from the property leased? It surely would.

The court has indicated that the payment of one dollar is sufficient consideration for a mining lease and between white man *sui juris* this may be true.

We believe it is not true of the Quapaw Indian. He is controlled by the same principles of law that govern the life-tenant

with power only to lease for a given purpose. He must so contract for the best rent, so that his remainderman, in the event of his death, will receive his just rentals.

We believe any extra or added benefits given or promised by the lessee to the lessor, whether it be one dollar or more, and in which the remainderman does not share avoids the lease *in toto*, and violates the policy of the government, because it is to be presumed the lessor was induced, by such added pecuniary benefits, to exact a less royalty than he could have obtained without them; and thereby he commits a fraud upon his heir. This was true at the common law, and the lessor was not permitted to accept a premium or fine when he was leasing under a gerenal power.

Sudgen on Powers, Volume 2, p. 346, says:

> "The power of leasing commonly introduced into settlements of estates in England, requires the best rent to be reserved, and expressly prohibits the taking of a fine."

Again, at page 347:

> "The simple question is—is the rent the best rent? If it be not, the lease must fall to the ground, however fair the transaction. But an expenditure on improvements is not like a fine paid. A man may be willing to give the best rent, and yet improve the estate; but if he were willing to give the rack-rent and a fine besides, he would no doubt increase the rent if the fine were remitted."

Again, the author at page 348, refers to the case of *Doe* v. *Rogers*, 5 Barn. & Adol. 755; 2 Nev. & Man. 550, wherein the lessor, under a power to lease in possession, obtained a covenant from the lessee that he—the lessee—would board certain children of the lessor, and the author says, page 348:

> "The case was tried before Taumton, J., who held that the covenants were in the nature of a premium taken by the lessor, and that taking of any premium whatever, made the lease absolutely void; and that as it appeared upon the face of the lease a premium had been taken, parol evidence was inadmissible to show that before the lease was granted the land had been valued by a person of competent skill, without any reference to the covenants by the lessee to maintain the lessor's children."

And this should be so. We know the force of ready money with the untutored Indian, and Congress had such condition in mind in the enactment of this statute, and the Supreme Court of the United States, in construing this act, we believe, had such condition in mind, and a construction has been adopted which will make unlawful the buying of mineral leases on valuable mineral deposits at a low royalty for a small cash bonus, which is oftentimes very persuasive with the Indian.

We think this is one of the evils sought to be eradicated by the Government, and the Supreme Court of the United States, in its construction, as given in the Noble case, *supra.*

II.

The court erred in holding that the petition filed herein stated facts entitling plaintiffs to relief in equity and directing that the motion to dismiss filed by defendant be overruled, because the basis of the cause of action plead was the lease made by Leander J. Fish, a Quapaw Indian, and was void for the reasons assigned in Assignment No. 1.

Under this specification of error we urge all of the matters set forth in support of our claim of error under No. 1.

III.

The court erred in failing to decree that plaintiffs by their conduct in seeking and claiming an interest in the Smith leases in the state court proceeding, were estopped to challenge their validity in this cause.

This suit at bar was filed in July, 1916. On September 29, 1916, following, McCullough and Landrum filed a suit in the District Court of Ottawa County against this defendant, Smith claiming that in 1913 they became interested in a sublease under Smith on the entire 200 acres of the Fish land; that they and their associates prospected and developed the land and did the work necessary to validate and preserve the Smith leases on the entire 200 acres; that they were entitled to an interest in *all* the *revenue* on *all* of the Fish land and *because of their interest under the Smith lease.* This position of McCullough and Landrum is disclosed by defendant's exhibit No. 1 (R. 271). They set out in this petition the two Smith leases under which they, McCullough and Landrum,

claimed an interest, and they are the *very two* leases they are *here* insisting *should be canceled.* In the case in the Ottawa County District Court they ask for a money judgment in accounting under these Smith leases, and here before this court they ask that the same leases be canceled. They are prosecuting both suits at the same time and occupying positions diametrically opposed to one another, and this is and should be repulsive to any court of chancery. Courts do not permit justice to go astray in this manner. The courts hold the party guilty of such conduct is estopped, or rather refuse relief to him on the theory that justice revolts at such conduct.

> "A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same, and the same questions are involved. Thus a party who has successfully interposed a defense or objection in one action or proceeding cannot shift his ground and take a position in another action or proceeding, which is so inconsistent with his former defense or objections necessarily to disprove its truth."
> 16 Cyc. 799.

> "If in a particular transaction or course of dealing the authority, capacity, character, or status of one of the parties is recognized as one of the basic facts on which the transaction proceeds, both parties are as a rule estopped to deny that the one occupied that position or sustained that character."
> 16 Cyc. 801.

> "If in making a contract or in a course of dealing the title of one party or the other to the property involved in the transaction is recognized, and the dealing proceeds upon that basis, both parties are ordinarily estopped to deny that title or to assert anything in derogation of it."
> 16 Cyc. 802.

The above statements are supported by a large number of cases cited thereunder. McCullough and Landrum claim Smith is their landlord in the state court case, and here seek to defeat Smith's title entirely and set up title in himself. This they cannot do.

"The rule that a party will not be allowed to maintain inconsistent positions in judicial proceedings, is not strictly one of estoppel, partaking rather of positive rules of procedure based on manifest justice and, to a greater or less degree, on considerations of the orderliness, regularity, and expedition of litigation."

10 R. C. L. 698.

"It may be laid down as a general rule that a party will not be allowed in a subsequent judicial proceeding to take a position in conflict with a position taken by him in a former judicial proceeding, where the later position is to the prejudice of the adverse party, and the parties in the questions involved are the same."

10 R. C. L. 702.

"Thus, it is a general rule that if one having a right to pursue one of several inconsistent remedies, makes his election, institutes suit, and prosecutes it to final judgment or receives anything of value under the claim thus asserted, or if the other party has been affected adversely, such election constitutes an estoppel thereafter to pursue another and inconsistent remedy. And where the right in the subsequent suit is inconsistent with that set up in the former suit, as distinguished from a merely inconsistent remedy the party is estopped though the former suit may not have proceeded to judgment."

10 R. C. L. 703.

This evidence is admissible as a judicial admission.

"One class of admissions consists in statements made by parties in the course of judicial proceedings, generally termed judicial admissions. Such statements are evidence against a party, and may constitute the basis of a verdict, whether made in pleadings and other written assertions, or orally by counsel."

1 R. C. L. 469.

At record pages 216-217, McCullough's testimony in the state court case was introduced, and there we find McCullough admits reading the pleading and swearing to it; that therein he is claiming an interest in 5% royalty on the *entire* 200 *acres* and based upon the *Smith lease,* and at the same time admits in his pleading that in the Federal Court case he is seeking to cancel the Smith lease.

"A party who as defendant in an equity case has successfully asserted that his adversary's claim is not cognizable in equity, cannot subsequently in an action at law brought by him against the plaintiff involving the same matter, assert that the same claim set up as a defense is of an equitable character."

Lutcher & Moore Lbr. Co. v. *Knight,* 217 U. S. 257.

The case of *Bailey* v. *Wright et al.,* 112 N. W. 853 (S. Dak.), the court quote the rule as follows:

"In such cases as this, the general rule has been stated thus: 'A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same, and the same questions are involved. Thus, a party who has successfully interposed a defense or objection in one action or proceeding cannot shift his ground, and take a position in another action or proceeding which is so inconsistent with his former defense or objection as necessarily to disprove its truth.'"

"No one should be allowed to assume antagonistic positions in litigation with reference to the same property or to the same fact, or state of facts, when such action will prejudice another party to the same suit or series of suits. *Crawford* v. *Nolan,* 70 Iowa, 97, 30 N. W. 32, 2 Black on Judgments, Sec. 632; *Lilley* v. *Adams,* 108 Mass. 50; *Hanley* v. *Foley,* 41 Ky. 519; *Louisiana Levee Co.* v. *State,* 31 La. Ann. 250; *Toope* v. *Prigge,* 7 Daly (N. Y.) 203; *Ker* v. *Wauchope, Gaudy* v. *Gaudy,* 3 English Ruling Cases, 310 and notes; *Kaehler* v. *Dobberpuhl,* 60 Wis. 256, 18 N. W. 841; *Edes* v. *Garey,* 46 Md. 24; *Brown* v. *Roberts,* 24 N. H. 131; *Stinson* v. *Sumner,* 9 Mass. 143, 6 Am. Dec. 49; *Johnson* v. *Flanner,* 42 La. Ann. 522, 7 South. 455."

Sioux City v. *Chicago & N. W. Ry. Co.* (Iowa), 106 N. W. 186.

"It is contended that because the name of the plaintiff's husband, Peter F. Kaehler, stood upon the assessment roll opposite the said land of the plaintiff as the owner or occupant of it, the tax must be held to be his tax, and the warrant would not justify the taking of her property upon it. In both the two former cases, the plaintiff predicated her rights upon the ground, in the first, that she was the owner of the property that was threatened to be taken for the tax,

and that she was the owner of the land upon which the tax was assessed, and if illegally assessed she was liable to pay it; and, in the second, that she was the owner of the property actually taken by the defendant for the tax, and that the tax was upon her land. The plaintiff is clearly estopped by these records from showing that the tax upon which the property was so taken by the defendant is not her tax, or that her property is not liable to be taken to pay it. Her first complaint was that this tax on her land was illegal and void, and she asked the court to set it aside and annul it, and obtained a preliminary injunction against its collection. Can she reverse her position now in the same controversy, and be allowed to allege that the tax was not hers to pay, but that of her husband? In this case she claims ownership of this personal property because, for one reason, it was on her land. The tax is on her land also. The assessor made the mistake in placing on the assessment roll the name of her husband opposite her land and her tax. But she has corrected it by repeated admissions and claims in these cases that both the land and tax are hers. *Allegans contraria non est audiendus.* In translation of this maxim of the law, Lord Kenyon said that *'a man shall not be permitted to "Blow hot and cold" with reference to the same transaction,* or insist at different times on the truth of each of two conflicting allegations, according to the promptings of his private interests.' Broom, Leg. Max. 168."

Kaehler v. *Dobberpuhl* (Wis.), 18 N. W. 843.

As in the last quoted case, McCullough and Landrum, in one court base their sole claim on the theory that Smith is the owner of the property here involved and ask to share in it, while here they deny Smith's ownership.

"The defendants cannot be permitted to rely upon positions so entirely contradictory and inconsistent, for the purpose of defeating the plaintiff's cause of action. The defendants, having procured a dismissal of the cause in the Cass Circuit Court, upon the ground that it was properly pending in the Adair Circuit Court, are now estopped from denying the jurisdiction of the Adair Circuit Court. The Adair Circuit Court assumed jurisdiction upon the action and pursuant to the requests of the defendants, and, for the purposes of this case, so far as the defendants are concerned, the jurisdiction of that court must be conceded."

Perkins v. *Jones* (Iowa), 17 N. W. 574.

"A party to an appeal from a justice's judgment in a replevin suit that has been held void for want of jurisdiction, is estopped from asserting the validity of such judgment in a subsequent proceeding."

Sweizey v. *Stetson* (Iowa), 25 N. W. 741.

"Where the question was, whether or not the paper declared upon bore the corporate seal of the defendants (an incorporated company), evidence was admissible to show that, in a former suit, the defendants had treated and relied upon the instrument as one bearing the corporate seal. And it was admissible, although the former suit was not between the same parties; and although the former suit was against one of three corporations, which had afterwards become merged into one, which one was the present defendant."

The Philadelphia etc., R. R. Co. v. *Howard,* 13 How. (U. S.) 307.

The opinion appealed from in dealing with the claim of estoppel reads (R. pp. 338-339):

"During the final hearing of this case after the plaintiffs had introduced their evidence and rested and while the defendant was presenting his testimony, the defendant, for the purpose of establishing an estoppel of the plaintiffs from maintaining this suit, moved to amend his answer and to plead and prove these facts: that this suit was commenced on July 1, 1916, that on September 29, 1916, the plaintiffs, McCullough and Landrum commenced a suit in the District Court of Ottawa County, Oklahoma, against J. E. Pottorff, defendant Smith and others, to recover from them certain shares of royalties that they alleged that Pottorff and Smith by virtue of the leases of Fish to Smith had collected and which Pottorff and Smith had agreed in 1913 to pay to McCullough and Landrum *for their advance of certain amounts of money to pay for drilling four holes on a forty acre tract of land included in the leases of Fish to Smith but not included in the lease to Hopper, upon which this suit is founded.* The court below, upon the objection of the plaintiffs, refused to permit the amendment of the answer, and refused to admit in evidence the proposed proof. Counsel argue that the proof thus offered should have been received because it disclosed a claim of McCullough and Landrum under the leases to Smith so inconsistent with the claim in this suit of the invalidity of those leases as to estop the plaintiffs from maintaining any proceeding to avoid them. But in the suit in the state court McCullough and Landrum claimed *that they*

advanced their money to pay for drilling the four holes in a forty acre tract *not included in the lease to Hopper.* They claimed that they made the contract with Pottorff and Smith, and advanced the money in 1913, and at that time they had no interest in the lease to Hopper. It was not until the spring of 1915 that they procured such an interest, and finally their claim against Pottorff and Smith in the state court *was based* on the alleged personal agreement of those gentlemen *to pay them for the advances they made to pay for the drilling of the four holes, and it did not assert, challenge or involve the validity or invalidity of any of the leases.* There was no inconsistency in the collection or the attempt to collect that claim, and the maintenance of this suit to establish the invalidity of the Smith leases as against the prior lease of the 120 acres to Hopper, and the court below fell into no error when it denied the motion to admit and rejected the evidence of the suit in the state court."

This, in our opinion, is clearly an erroneous statement of the facts established and uncontroverted by the record. The plaintiffs in the state court did not claim nor sue for money advanced, but did actually seek a judgment against this appellant establishing their right to an accounting for a share of the royalties then paid and *to be paid on the entire* 200 *acres* of the Fish allotment, and this *included the acreage involved in this suit at bar.*

Please note our amendment to answer, Record, pp. 317-218.

The best evidence of the claim of plaintiffs is shown in their petition filed in the state court and verified under oath by Mr. McCullough. The petition is set out at length in the record at pages 271 to 281, inclusive, and here it is shown that they claimed they were interested in an oral sublease from Smith on the entire allotment of Fish aggregating 200 acres. They plead on pages 271-276 inclusive, as part of their cause of action in the state court, and in which they became interested the very identical leases that Smith set up in his answer herein (see Record, 16 to 21, inclusive). A comparison will show them to be identical. In appellees' reply herein (Record, 55-57) they assert the invalidity of these leases.

We call to your attention that McCullough at the trial was shown defendants' Exhibit No. 1 (his petition in the state court, Record, 271-281) and he acknowledged his signature thereto, which was under oath (R. 100).

Please note the contents of the petition in the state court (R. 271-281); they say Smith obtained two mining leases from Fish, and, combining the acreage, they cover the East Half of Northwest Quarter and West Half of Northeast Quarter and Southeast of Northeast Quarter, all in Section 32, Township 29 North of Range 23, or 200 acres. (This includes the acreage in the Hopper lease. Record Hopper lease, page 43.) They further plead they (plaintiffs in state court suit) under an oral sublease from Smith, developed the property; that Smith, ignoring his sublease to them, subleased to Church and Mabon and set out again the acreage let to Church and Mabon, which is the entire 200 acre tract (including the acreage in the Hopper lease, Record, 277); that Church and Mabon were operating the property and paying Smith 15% royalty or 5% more than plaintiffs were obligated to pay. They say (R. 281) they are entitled to a one-third of all royalties paid and *to be paid* and pray an accounting and judgment for such interest, and (R. 281):

> "They further ask that all of the defendants be required to account with the plaintiffs for one-half of the 5% extra royalty *demandable under the lease* from and after the beginning of the suit for the defendants Mabon and Church, etc."

Here they seek judgment for an accounting against Smith on the entire acreage (including Hopper acreage) for accrued royalties and the establishing of their interest in the royalties to accrue *during the life of the lease* and their claim is bottomed on the alleged oral sublease from Smith.

It is true counsel for plaintiffs herein by brief and oral statement in argument insisted McCullough and his associates claimed an interest under Smith in the state court suit in only one forty acre tract, but this claim of counsel has confused the court and is a direct contradiction of the formal claim as shown by the pleading as we have shown. It is also opposed to the interpretation of McCullough as he testified when examined concerning the matter (R. 217):

> "Q. If you recover in this law suit you are seeking to recover what?
>
> A. Just exactly what is due me.

Q. What is it?
A. My interest in five per cent of the royalties on that land.
Q. On the 200 acres?
A. 200 *acres.*
Q. *Based upon the Smith lease?*
A. *Yes, sir.*"

It is true that all the drilling done by McCullough and his associates under their alleged oral sublease from Smith was done on a forty acre tract not included in the Hopper lease, but that is immaterial. They were claiming and seeking by judgment to establish an interest in and under the Smith lease on the whole 200 acre tract.

Nowhere in their petition in the state court do they seek judgment for money advanced by them for drilling, but bottom their suit in equity for an interest in these leases on 200 acres under Smith. In the case at bar they seek to destroy the very leases they claimed under in the state court.

Our attention has been called to the recent decision of *Hertzel* v. *Weber,* 283 Fed. 921. In this case Hertzel claimed an interest in a sublease and an accounting thereon on oil property with Weber in a state court proceeding. He lost his suit. He then purchased the fee to the land and then brought suit in the Federal Court seeking cancellation of the Weber lease alleging it to be void.

In the case at bar the same identical proceeding happened, only McCullough purchased a lease instead of the fee. The court, in *Hertzel* v. *Weber, supra,* said (page 930):

> "He insisted throughout the litigation in the state courts that the arrangement which Weber had made with the lessees was a valid and binding obligation and that he was entitled to an interest in it. After such conduct he should be estopped on familiar principles from thereafter asserting the contrary.
> * * *
> "Conceding for the moment that Weber's contracts were in their inception void, and that the defense of *res adjudicata* was not sustained, we hold that Hartzel's conduct estops him from claiming that he did not take title to the tracts subject to the rights which those contracts purported to give Weber."

In the case at bar at the very time this cause was being tried McCullough and associates were pressing their appeal in the State Supreme Court (Record, 319). If they should win in the state court Smith would be required to account to them for royalties on account of his oral sublease to them, and if this judgment in this court shall stand he shall be required to account again to them on the theory his possession has been under a void lease.

Courts of equity should not permit shifting of position in his matter. In one proceeding we are sought to be required to account because they are our tenants. In the other we must respond in accounting because our lease title is void, and these two inconsistent positions being maintained at the same time in different courts and concerning the same subject matter.

Surely the court did not grasp the full significance of our position. The court certainly misapprehended the facts as shown by the record.

The amended answer was not a surprise to appellees. In the opening statement by Mr. Thompson for appellant he informed the court and appellees that this matter would be offered for defense (Record, 72). The appellees not only did not deny the truth of such matter, but admitted the evidence offered as true.

But really was an amendment to the answer necessary? We think not. The estoppel is rather a refusal of relief to the party on the theory that justice revolts at such conduct.

IV.

The court erred in not permitting this defendant to file an amendment to his answer charging more in detail the fact of such state court proceeding, after the evidence had been admitted and the plaintiffs herein had admitted that such allegation of proceeding in the state court was correct.

The court should have permitted the amendment offered. No one could have been hurt. It had to do with matter unchallenged and admitted. In the opening statement of counsel for defendant it was mentioned as a defense (Record, 72). It was a species of estoppel that required no special pleading. It was rather evidence of conduct that causes a denial of relief to the offender by a court of equity.

See cases cited in preceding subject.

V.

The court erred in finding that the plaintiffs or their assignor had paid five cents per acre annually for the three-year period before they claimed to have taken possession of said land.

The court erred in failing to find that plaintiffs had abandoned their lease by failing for more than three years to perform any of the covenants to prospect and mine under said lease, and by their conduct in buying and selling interests therein for nominal consideration.

The court erred in finding that the plaintiffs have acquired by assignment the mining lease executed by the Quapaw allottee on April 29, 1912, to Dallas Hopper, for the reason that this record does not disclose that these plaintiffs have acquired the whole interest in said lease.

The "Lieu Money" was not Paid.

The sole evidence of payment of lieu money was given through witnesses A. C. Jones and Henry Payne Hopper. The testimony of Jones is shown in the record at pages 118-121, and this witness testifies that he saw Hopper pay three dollars to Leander J. Fish, the land owner, in May, 1912. The witness does not pretend to testify as to the purpose of making such payment.

The witness Henry Payne Hopper testified (pages 154-158) and this witness only pretends to testify to one single payment made by Dallas Hopper to Leander J. Fish during the fall of the year 1914. He says this payment was ten dollars. This leaves the record as conclusive against the contention of plaintiffs that the delay money was paid. There was an attempt made to have Dallas Hopper testify that at the time of the making of the lease, as a part of the same transaction he made a cash payment, but the court very properly excluded such testimony as being incompetent because it was testimony concerning a transaction with a deceased person when the opposite or adverse party was the assignee or representative of such deceased person, and under the statutes of the State of Oklahoma such testimony is incompetent, and same was excluded. This leaves the sole testimony of payment that of the witnesses Jones and Henry Payne Hopper, and clearly establishes that at the best only thirteen dollars was paid to the land owner, three dollars of which was paid in May, 1912, and ten dollars paid in September or October, 1914. The three dollars paid

in May, 1912, was no doubt for the lieu rental for the first ninety days, which would expire before November, 1912, and no other payment having been made in November, 1912, the land owner executed the lease to the defendant herein on a portion of said lands, and in January, 1913, executed an additional lease covering the remaining acreage of his allotment to the defendant herein. Clearly, under the evidence, at the time of the execution of the leases to the defendant herein the plaintiff's assignor Hopper was in default in payment of lieu money, and he made no effort to make payment thereof until nearly two years thereafter, to-wit, September or October, 1914. Long prior to this last mentioned payment the defendant, in complete and full compliance with the terms of his leases, had entered upon said lands, subleased same to Church and Mabon, drills were operating thereon, and large expenditures had been made in prospecting said land by this defendant. Even if the plaintiffs might prevail by relying solely and exclusively upon the claim of having kept their lease in full force and effect by paying the pittance of six dollars per annum as lieu money, the proof is conclusive that such payments were not made, and that upon default in making said payments the land owner elected to treat the lease as abandoned and forfeited, and contracted same to this defendant.

By failure to work, prospect or mine said land for more than three years, said lease was abandoned.

The Hopper-McCullough lease was executed April 29, 1912, and although the petition avers the immediate taking of possession by prospecting, etc., there is no evidence to support such allegation, and the testimony conclusively establishes by admission of the plaintiffs that none of the plaintiffs nor their assignor ever went upon the lands to prospect and mine or take possession thereof until after May 1, 1915. Hopper and McCullough frankly admit this to be a true statement, and McCullough admits that the allegation of his petition of taking immediate possession and working was untrue.

Hopper testifying (Rec. 78-79) in answer to

"Q. Now, Mr. Hopper, after that lease was executed what was done, if anything, and when, in the way of developing the lease?"

answered:

"A. Well, *on May* 5, 1915, *I commenced* a shaft on the Southeast of the Northeast."

And the witness further said that said shaft was sunk 35 feet and abandoned, and two other shafts, 28 and 48 feet deep, respectively, were sunk and abandoned. He closed his testimony (Rec. 81) by saying that no work had ever been done upon any of the lands involved herein prior to May 5, 1915.

McCullough, testifying (Rec. 91, 92) admits that by his allegation in his petition that he took immediate possession after the execution of the lease on April 29, 1912, he meant that the lieu money had been paid, and then admits that no work of any kind or character was done under his lease in the years of 1912, 1913 and 1914, and the year of 1915 prior to May 5, 1915, or a period of more than three years after the execution of the lease. It is clear from the testimony that is developed by the testimony of defendant and his witnesses, who produced actual drill records, that these lands had been prospected under the defendant's lease and through his sublessees, beginning in the year of 1913 and extending through the year of 1914, and that about the first of May, 1915, the fact that they, the defendant's sublessees, had made a very rich strike upon said lands became known to the public, and then immediately, and about May 8, 1915, the plaintiffs, through Hopper, went upon said lands at a point far distant from where there had ever been any prospect drilling, and commenced the sinking of a shaft. It is clearly apparent from the testimony that the fact that this shaft was started far from any proven territory, and was only put down to a depth of a few feet, is conclusive that the plaintiffs were not seeking to mine or comply with the terms of their lease, but were only attempting to get a scrambling possession and embarrass the defendant and his tenants in their attempt in good faith to develop and explore the ore bodies upon said land. The testimony discloses that the plaintiffs drilled a few holes spasmodically and sank a few of these so-called shafts while this litigation was pending, but at no time have ever sunk a shaft to a depth beyond sixty feet, while all the drilling was done to a depth of at least 150 feet. This shows that the plaintiffs were

not sinking shafts for the purpose of opening up the ground, but, as was stated by several of the witnesses, it was done for the purpose of holding the ground. We emphasize the testimony of Hopper and McCullough admitting that no effort had been made to develop this property for more than three years after the execution of their lease because of the fact that this court, when the case was before it upon the pleadings, based its judgment therein upon the allegation of the plaintiff's petition that immediate possession had been taken and work done thereunder continuously. The conduct of these plaintiffs, as stated above, clearly shows an abandonment.

The Hopper-McCullough lease was never taken with the intention of mining under it, but only to speculate upon.

An examination of this record will disclose a state of facts convincing any mind that Hopper and these plaintiffs never, prior to bringing this suit, considered they had a mining lease of any validity or value; that they only had a piece of paper with which to barter and trade. The record discloses the real estate records of Ottawa County burdened with a very large number of assignments by Hopper and McCullough of small undivided interests in the Hopper lease, and these assignments were executed so far as the records show for a nominal consideration. This traffic in the Hopper lease did not start until April, 1915, when Church and Mabon, under the Smith lease were getting encouraging signs from their drilling. It was then Hopper came to life after his three years sleep and made so many assignments of the lease in undivided interests that it is impossible to tell from this record or the real estate records of Ottawa County, who is the legal owner of the Hopper lease. This is strong evidence of just one thing, that Hopper and McCullough had long ago abandoned the lease, had no intention of working it or in good faith asserting any rights thereunder. Ray McNaughton was offered as a witness for the defendant (R. 218-219) and through him we offered to prove that in April or March, 1915, Hopper came to him and offered to, *and did,* give him and his father a two-thirds interest in this lease for *nothing;* that Hopper told him he could do nothing with the lease. The court excluded this testimony, but upon what theory we are unable to say. The record (301) does show that Hopper

assigned at this time to McNaughton a two-thirds interest for $1.00 consideration. Is it not competent to show that the lessee, having done nothing for three years, then offered to give his lease away? Is this not cumulative proof of the intention to abandon his claimed rights? This is certainly competent under the pleading of the plaintiffs wherein they solemnly aver that they took possession immediately and prospected by drilling and developing the ore bodies. This evidence excluded not only disputes such an allegation, but establishes the fact that Hopper himself considered he had nothing of value or worth.

Hopper and McCullough were using the old Hopper lease as a means of catching suckers wherever one could be induced to bite, knowing their lease was abandoned, and further knowing that it contained a clause, "perpetual term," invalidating it in the opinion of all the local bar and in accordance with numerous judgments rendered by the trial court in similar cases instigated and prosecuted by the United States, wherein Mr. Ewert acted for the Government. Hopper and McCullough knew all this, Ewert knew it, and Towne knew it. Embarrassment of Smith and his tenants by clouding the title and a scrambling possession with a view of a compromise was the game of the plaintiffs.

It would do no harm to refer to the record to show how this Hopper lease has been bartered and sold and given away. At record, page 247, there is an assignment from Hopper to W. P. McCullough for the sum of one dollar, assigning an undivided one-sixth interest in this lease. At page 258 an assignment by Hopper to Thomas F. Phillips for the consideration of one dollar, of an undivided 1/36 interest in this lease, and at page 259 an assignment by McCullough to B. E. Beth, for a consideration of one dollar, of an interest of one-eighth in this lease. At page 260 an assignment by Mollie J. McCullough to W. P. McCullough for a consideration of one dollar, an undivided one-fourth interest. At page 261 Dallas Hopper assigns to J. P. McNaughton and Ray McNaughton, for a consideration of one dollar, an undivided two-thirds interest in this lease. This is the assignment that Ray McNaughton offered to testify was given by Hopper to him and his father without any consideration, and that Hopper at that time stated that he could not do anything with the lease, and this was three years after the lease was executed.

At page 263 Hopper assigns to James C. Briggs for a consideration of one dollar an undivided one-twelfth interest in this lease. At page 264 Ray McNaughton assigned to J. P. McNaughton his interest in said lease, which would be one-third, for a consideration of one dollar. At page 265 J. P. McNaughton assigned to W. P. McCullough, for a consideration of one dollar, five-ninths of this lease. At page 266, Dallas Hopper assigned to James C. Briggs and W. P. McCullough, for one dollar, an undivided two thirty-sixths interest in this lease. At page 268 J. P. McNaughton assigned to W. P. McCullough a one-ninth interest in this lease for a consideration of one dollar. At page 269, J. C. Briggs assigned to W. P. McCullough all his right, title and interest in and to said lease for one dollar. At page 270 Pete McCullough assigned to W. P. McCullough all his right, title and interest in and to this lease for a consideration of one dollar, and these last two mentioned assignments were made long after this suit was filed. Record page 304 discloses an assignment, made on the 7th day of June, 1916, by W. P. McCullough to A. C. Towne and Paul A. Ewert for a consideration of one dollar, of an interest equal to an undivided two-fifths of twenty-seven thirty-secondths, and an assignment at page 305 from A. C. Towne to J. C. Jacobs on the 9th day of June, 1916, of an undivided one-half of one-fifth interest in said lease.

We pause here to call to the court's attention that McCullough testified (R. 91) that the assignments to his attorneys, Towne and Ewert, was contingent on the success of this suit, and that they did not have an absolute assignment, and he promised to produce the instrument, and failed to do so. The record at page 304 is a certified copy of the assignment, showing it to be an absolute assignment and made prior to the filing of this suit, and one of the assignees, A. C. Towne, as shown by the exhibit on page 305 has assigned an interest to another outsider, one J. C. Jacobs, showing clearly that the plaintiffs are not even the owners of the Hopper lease and that there are numerous interests outstanding as disclosed by these records.

Another instrument, shown at page 306 of the record, is an assignment by W. P. McCullough, the plaintiff, to Frank Gaines of an undivided three-sixteenths interest in this lease for a consideration of one dollar. This assignment was made in April,

1917, long after this suit was filed, and so far as this record is concerned Gaines is still the owner of this interest. It is a noteworthy fact that as a part of this assignment McCullough assigns also an undivided one-sixteenth interest in and to a certain verbal mining lease in which he was interested, made by Jim Pottorff to T. L. Robinson. This last mentioned lease, in which he was assigning an interest, is the subject matter out of which grew the suit of McCullough, Robinson *et al.* against Pottorff and Smith, in the District Court of Ottawa County, Oklahoma, and wherein McCullough claims that he was interested in a sublease under Smith on the entire 200 acres of the Fish land; and was at time of trial pursuing this claim on appeal in the Supreme Court of Oklahoma, and at the same time in this court, contending, that Smith's lease is invalid and that he owned a lease prior to the Smith lease. We here find McCullough, even a year after filing the suit at bar, bargaining and selling an interest in the Hopper lease as well as an interest in his sublease under Smith, in which he claims an interest. This certainly discloses bad faith, and no court should permit McCullough to assume such inconsistent positions and to be benefited thereby. He seems to be willing to sell an interest in conflicting leases to the same person and in the same transaction, and receive money therefor.

At record page 308, McCullough assigns to E. M. Landrum, November 1, 1916, an undivided one-eighth of an undivided 81/160 in this lease for a consideration of one dollar. This is the place where Landrum gets in this law suit, although he acquired his interest, we have seen, many months after the suit was filed. Record, page 309, conveyance by W. P. McCullough to Mollie J. McCullough, for one dollar, of an undivided one-fourth interest in this lease in question, and this assignment was made on January 19, 1917, long after McCullough brought this suit. Record 310 shows an assignment by McCullough to Peter McCullough on the 7th day of July, 1916, of an undivided one-fourth interest in an undivided 81/160 in this mining lease. This assignment was made on July 7, 1916, about the time of the filing of this suit. The record at page 311, McCullough assigns, on the 7th day of July, 1916, to Theressa McClelland an undivided ⅛ in an undivided 81/160 in this lease for one dollar. This was about the time of the filing of this suit.

Record, page 312, discloses that Dallas Hopper, on the 17th day of May, 1915, assigned to Curt Williams an undivided 1/36 interest in this lease for the consideration of one dollar. Record 313, Hopper assigns to James C. Briggs and W. P. McCullough an undivided 2/36 interest in this lease. Record 315, Dallas Hopper assigns to Thomas F. Phillips, an undivided 1/36 in said lease for a consideration of one dollar. At page 316 Dallas Hopper assigns to James C. Briggs an undivided 1/12 interest in and to said lease.

If the court will take a little time and attempt to figure out from these various assignments disclosed by the record, we venture to say that this court cannot determine from these assignments that McCullough and the other plaintiffs are the owners of this lease. It is clear from the record that there are a number of outstanding interests, assignees of these plaintiffs and Hopper, that now have interests and are not here in court, and that the plaintiffs have not established that they are the owners of this lease, as they plead. This record is conclusive that about May 5, 1915, a rich strike of ore was found in the Fish land, and immediately the plaintiffs and their assignor, Hopper, commenced to interfere with the men who were developing the property. They did not believe that they had a valid lease for the reason that it was considered invalid, and for the further reason that it had been abandoned, and this conduct of assigning the lease in small undivided interests to a large number of persons for a nominal consideration, after the rich discovery of ore was found is conclusive evidence that they did not discover they had anything of value or worth, and this suit was filed for no other purpose than that of embarrassing the defendant Smith and his tenants and seeking to obtain a compromise. They did not stop with the filing of this suit, as this record, as we have just shown, discloses that they have been selling and buying back and forth since the filing of the suit, and it is impossible for this court or any other person to determine from this record just who is the owner of the Hopper lease at the present time. We say such conduct is evidence of an abandonment of the lease as a lease, and is evidence of their own belief that they had no substantial claim to any mining rights thereunder.

We are carefully digesting the record transfers of the Hopper lease to show that plaintiffs own a very small interest in it and the owners of majority are not claiming or asserting it to be a valid lease as against Smith. The following digest shows plaintiffs to own, when the suit was filed, about one-half of the lease, and when testimony was taken less than one-third was owned by plaintiffs.

McCullough received before filing suit July 1, 1916:

Record page	Name of Assignor	Date	Interest
247	Dallas Hopper	April 9, 1915	1-6 or 6-36
265	J. P. McNaughton	April 7, 1915	5-9 or 20-36
267	Dallas Hopper	April 15, 1915	1-36
268	J. P. McNaughton	Oct. 18, 1915	1-9 or 4-36
	Total		31-36

McCullough sold prior to July 1, 1916:

Record	Assignee	Date	Interest
259	Beth	May 20, 1915	1-8 or 10-80
304	Towne & Ewert	June 7, 1916	2-5 or 27-32 or 27-80
	Total sold		37-80

Secured before suit	31-36
Sold before suit	37-80
Difference	287-720 *Held when suit filed.*

The other plaintiff Beth held 1-8 when suit filed and Landrum acquired no interest until November 24, 1916, after the suit was filed (R. 274). Beth's 1-8 plus McCullough's 287-720 equals 377-720 or the whole interest of the plaintiffs when this suit was filed.

Let us show how the interests were when this record of testimony was made.

McCullough sold after suit was filed:

Record	Assignee	Date	Interest
306	Frank Gaines	April 14, 1917	3-16 or 30-160
308	E. M. Landrum	Nov. 24, 1916	1-8 of 81-160 or 10-160

309	Mollie McCullough	Jan. 19, 1917	1-4 or 40-160
310	Peter McCullough	July 7, 1916	1-4 of 81-160 or 20-160
311	Theresa McClelland	July 7, 1916	1-8 of 81-160 or 10-160
	Total sold		110-160

McCullough received after suit:

Record	Assignor		
260	Mollie McCullough	Apr. 14, 1917	1-4 or 40-160
269	J. C. Briggs	June 27, 1917	1-36 or 5-160
270	Peter McCullough	July 9, 1919	1-4 of 81-160 or 20-160
	Total		65-160

McCullough owned July 1, 1916	287-720
Received since July 1, 1916	65-160
Total	1159-1440
Sold since July 1, 1916	110-160

McCullough *now owns* the difference 169-1440 *or about* 1-9

Plaintiffs owned when case tried as shown by the record:

McCullough	1-9	
Beth	1-8	(R. 259)
Landrum	1-16	(R. 308)

or a total title in plaintiffs *now* of only 43-144 of the whole, *less than* 1/3.

The record conclusively shows present outstanding interest in:

Record 306	Frank Gaines	3-16 or 30-160
Record 304	Towne & Ewert	2-5 of 27-32 or 54-160
Record 311	Theresa McClelland	1-8 of 81-160 or 10-160
Record 312	Curt Williams	1-36 or 5-160
		99-160

A total of 99-160 or approximately 5/8 interest of the McCullough-Hopper lease outstanding and not joining in this suit at time of judgment.

We feel that no court of equity can view this record of wholesale selling of small undivided interests for nominal con-

sideration without concluding that the McCullough lease was something to trade and speculate in, and no mining was ever intended. Their activity in sinking numerous "shafts" to a depth of a few feet and thereafter abandoning same confirms this view and sustains the charge of bad faith, and when judgment was rendered the owners of 5/8 of the lease were not asserting any claim to it.

All these matters firmly establish the contention of Smith that the conduct of plaintiffs has been one of bad faith at all times and the mulcting of the defendant is the primary purpose of the suit.

There can be no two opinions offered seriously here concerning this conduct. Smith had his lease, taken in 1912 and 1913, and through his efforts his tenants were expending many thousand dollars in prospecting and developing the ore bodies thereon. He was not speculating, his lease was valid in the opinion of the entire bar, and there was no trouble to get men of financial means to develop. His prospecting was done, part on the land here involved and part on the Montreal forty. He was complying with the terms of his leases—he was mining. Hopper and McCullough, on the other hand, held a lease that was permitted to lay for more than three years without work. It contained a clause condemning the lease, in the opinion of every lawyer in the district, including Mr. Ewert. No one would handle it or develop under it. Smith commenced to get encouragement by his drilling, and then Hopper and McCullough conceived the idea of "taking possession" by starting a shaft on a portion of the land far removed from any development or prospect. *This alone is evidence of bad faith.* This shaft was sunk in a corner far from any indications of ore to a depth of about 25 feet. Other holes in the ground were dug by the plaintiffs, none of which went over 35 feet. This court knows this is not mining, and all this was done more than three years after the lease was taken. All the drilling done by plaintiffs was done for ore below a depth of 100 feet, showing conclusively that no shallow ore was expected. Then why these numerous holes in the ground dug to a shallow depth and then abandoned? There is but one answer —it was a mere pretense of mining carried on for the purpose of embarrassing Smith, the real miner. The action of the plaintiffs in October, 1917, when they started another shallow hole on the Quebec forty, is indicative of their real purpose. Smith had two drills running continuously on this forty from June, 1917, to Oc-

tober, 1917, drilling at least 18 holes during that time. This drilling developed a rich body of ore and the strike became public property and immediately the plaintiffs moved equipment on *this forty* right near the two operating drills and started another "shaft." They had not been prospecting there and knew that defendant was and had been prospecting same with several drills for several months.

Another glaring evidence of bad faith on the part of plaintiffs is shown by witness Williams, offered by the plaintiffs. He was interested with the plaintiffs in the forty-acre tract, where the defendan tin 1917 was enjoined from interfering with the plaintiff's operations. Williams (R. 123) says he sank a "shaft" to a depth of 45 feet; that he sank the "shaft" *ten feet* in *six* or *eight months' work;* that he knew of no ore strike on this tract he was interested in and was sinking the "shaft" to hold the "lease," and finally quit; that this work was done by Hopper, his hired man; that he paid Hopper $25.00 per month "for keeping his lease in operation"; that he *presumes* Hopper sank the shaft. This is the strongest kind of evidence of bad faith. Plaintiffs came to trial court, obtained a restraining order in November, 1917, and upon hearing the defendant was enjoined from interfering with the operations of plaintiffs on this southeast forty Williams is discussing. Now they were free to show their good faith. Their good faith is disclosed by Williams—sank a shaft ten feet in six months for an outlay of $25.00 per month. What a farce. He is not even sure that it was sunk ten feet. He "presumes so." He paid Hopper to "keep the lease in operation." That is the crux of the situation. Hopper moved a hut on this tract, lived in it, and "kept this lease in operation" for $25.00 per month, and this is the plaintiff's theory of mining. Can it be possible that this is a trial of property rights made worth many thousand dollars by the efforts of defendant, or is it to be considered by the plaintiffs as a huge joke? This attempt to show mining in good faith by plaintiffs is an insult to the intelligence of the court. Plaintiffs' Exhibit 7 (R. 251), being the lease held by witness Williams, discloses that McCullough was wrong when he testified that the interest of Towne and Ewert was contingent. The lease is made and signed by Ewert and Towne and others, not parties to this suit, and this was dated December 20, 1917, long after this suit was filed.

The lease (Rec. p. 8) contains an express covenant to "exercise diligence in prospecting and mining operations," and we have seen that the real consideration was the agreement to mine. However, an express covenant would not have been necessary, as the law would have implied one.

> "It cannot be conceived, therefore, that the contract was made merely to enable the lessee to speculate wholly for his own profit, or that the lessor intended to encumber his property for a period of ninety-nine years with a lease from which he might derive no benefit whatever until near the end of the term. The purpose in view was development of the property, and the parties evidently contemplated that mining operations should be begun within a reasonable time after the making of the agreement. True the lessee did not expressly covenant to begin mining at any certain time, nor does the lease contain any clause forfeiting it for failure to mine within a reasonable time. But the law as it has been understood and applied by this court, implies such a covenant in every mining lease reserving to the lessor, as a consideration therefor, a royalty measured by the amount of mineral produced."
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> *Chandler* v. *French,* 73 W. Va. 658, 81 S. E. 825, L. R. A. 1915B, 561.

Any unreasonable delay in beginning operations under a mining lease amounts in law to an abandonment of the mining and justifies the lessor in making a lease to another lessee. And this is as true of leases for lead and zinc as of those for oil and gas.

In *Loveland* v. *Longhenry,* 145 Miss. 60, 129 N. W. 650, 140 Am. St. Rep. 1068, the lease was to mine "all lead, drybone zinc and other ores," and the court said:

> "It is noticeable that the lease fixed no time for its expiration, fixed no day for the payment of rents or tributes, and contained no express provisions for forfeiture."
>
> (Page 1069.)

At the risk of the charge of prolixity we quote further from this case:

> "We may leave out of consideration the failure to pay rent or tribute on ore mined because there was no ore mined on any land covered by the lease in question. We may also

leave out of consideration any failure to 'work, develop and operate any mine or mines discovered on said land in a good, reasonable and miner-like manner for at least nine months in every year,' because there was no mine discovered on any land covered by said written lease. This leaves the only default of the plaintiff to consist of suspending prospecting operations on said land from September 1, 1907, to November 14, 1908. The lease is expressly given in consideration of the rents to be received and the covenants and conditions to be performed by the lessee. No rent would ever become due if no ore was discovered and mined. No ore would be discovered without prospecting. One of the stipulations of the lease going to the whole consideration and described therein as a covenant and condition, was that the lessee should, after July 1, 1907, prospect the lands. This meant diligent and fairly continuous prospecting and search for a mine so that the land owner would receive something for his land. While analogies arising from urban or agricultural leases are not to be wholly rejected, it must be remembered that these mining leases form a distinct class of instruments, creating special and peculiar legal relations and legal rights. In *Maxwell* v. *Todd*, 112 N. C. 677, 16 S. E. 926, the mining lease had a fixed term of ninety-nine years, but otherwise it was very similar in terms to the lease in the instant case. The court, noticing that there was in the lease no stipulation for forfeiture for failure to open and work the mines, held that the construction which the law put on the lease would be the same as if such stipulation had been expressly written therein. The contrary construction would prevent the lessor from getting his tolls under the express covenant to pay the same and at the same time deprive him of all opportunity to work the mine himself or lease it to others. In *Starn* v. *Huffman*, 62 W. Va. 422, 59 S. E. 179, there was a mining lease from Starn to Huffman for one year and as much longer as Huffman should continue to work the mine, the lessee to pay ten cents per ton for all coal mined and begin mining coal on or before December 19, 1902, and pay for said coal every 30 days. There was nothing in the form of a condition and no express stipulation for forfeiture. Nothing was done under the lease, and it was held that this called for a termination of the lease. Many cases are collected and reviewed in the opinion of the court: See, also *Shenandoah L. & A. C. Co.* v. *Hise*, 92 Va. 238, 23 S. E. 303; *Western Pennsylvania G. Co.* v. *George*, 161 Pa. 47, 28 Atl. 1004; *Woodward* v. *Mitchel*, 140 Ind. 406,

39 N. E. 437; *Huggins* v. *Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; 20 Am. & Eng. Ency. of Law, 2nd Ed. 779, 781; 26 Cyc. 708, 709, and cases.

In *Island C. Co.* v. *Combs*, 152 Ind. 379, 53 N. E. 252, it is said: 'In leases of mineral lands, of the nature of the one in question, where the lessee agrees to pay to the lessor, a royalty or rent, which depends on the amount of coal or other product mined, the lessee thereby in the absence of any provision to the contrary, impliedly obligates himself to begin the development of the coal, and the mining thereof, within a reasonable time after the execution of the lease. As to what may be regarded as a reasonable time, however, depends upon the circumstances of the particular case.'

The application of a cognate principle is discernible in *Western L. & C. Co.* v. *Copper River L. Co.*, 138 Wis. 404, 120 N. W. 277, *Horner* v. *Chicago, etc., R. C.*, 38 Wis. 165, contains these words: '(1) Although there are technical words, which, if used in a conveyance, unmistakably create a condition, yet the use thereof is not absolutely essential to that end, and a valid condition may be expressed without employing those words. (2) It is not essential to a valid condition that, in case of a breach thereof, a right of re-entry be expressly reserved in the deed, or that it be expressed therein that the estate of the grantee shall terminate with a breach of the condition.'

Applying these abstract rules, we say in the instant case: Where a mining lease is granted upon the consideration that the lessee shall observe the covenants and conditions thereof, and the lessee covenants to prospect the land and in case he discovers a mine pay the lessor rent, royalty, or tribute based upon the ore mined from such mine if discovered, the covenant to prospect the mine is in the nature of a condition, and the lessee must proceed with and persist in prospecting with reasonable and continuity of effort. Was the delay of the lessee in the instant case unreasonable? In *Norway* v. *Rowe*, 19 Ves. Jr. 144, it was averred in the bill, and apparently assumed to be correct by the court and counsel, that by the customs of Cornwall suspension of operations by prospectors or adventurers for a year and a day was ground for forfeiture of their interest in the mineral land. McSwinney accepts this as proof of the custom of Cornwall in his excellent treatise on mines. In this age and country of greater hurry and activity the limit of suspension of prospecting should without sufficient excuse certainly not exceed that. The

finding of the learned Circuit Court, whose circuit includes the most ancient and active mining district in this state, also supports the conclusion that the delay in the instant case was unreasonable. We are aside from authority and foreign customs, disposed to agree with this determination. We find no sufficient excuse for the delay in the fact that the lessee was without means to carry on the prospecting work."

(Pages 1071, 1073.)

"The authorities are numerous which hold that such dereliction of duty avoids a contract. Unless such stipulations are performed within the time agreed upon and in good faith, the law implies a forfeiture."

Kentucky Diamond Min. Co. v. *Sellers,* 143 Ky. 526, 136 S. W. 1016.

"It follows from this rule that a plan and substantial disregard of its duty to operate the lease in such a manner as would be reasonably expected of operators of ordinary prudence, having regard to the interests of both the lessor and lessee, would be a breach of its contract."

Wellsville Oil Co. v. *Miller,* 44 Okla. 493, 145 Pac. 344.

"Looking at the lease in question, the situation of the parties, and the circumstances attending its execution, it cannot be doubted that it by fair implication imposed on the lessees the duty to begin mining operations within a reasonable time, in order that appellee might receive the real and an adequate consideration for granting the lease. A year or eighteen months was fixed by appellants as a reasonable time. Yet they failed to begin work within that time at all. After waiting three and one-half years for appellants to begin operations, during which time they made no efforts to do so, appellee rightfully treated their inaction as an abandonment by them of the contract."

Killebrew v. *Murray,* 151 Ky. 345, 151 S. W. 662.

Here, Hopper *did nothing* for more than three years while defendant was in possession with drill rigs tracing and locating the ore bodies, and when it became known to him, May, 1915, that rich ore had been found by defendant he commenced to speculate with his lease and made numerous assignments of portions for nominal cash payments. This act alone of bartering is evidence of abandonment of the lease.

"It is said by appellant that there has been no intentional abandonment of operations under the lease. * * * The

best evidence of the intention of the appellant in that respect *is its conduct,* and its failure to operate for five years is a practical abandonment within the meaning of the contract."

Collins v. *Mt. Pleasant, etc. Co.,* 85 Kan. 483, 118 Pac. 54.

So here, plaintiff will argue that abandonment is a matter of intention, but the intention of the parties gathered from their long delay, bartering and selling of interests, and bad faith attempt to do real mining even after they obtained a scrambling possession, is as a matter of law conclusively established as an abandonment.

"Such a lease may be abandoned, and when once abandoned by the lessee, he cannot thereafter claim or enforce any right thereunder without first securing the consent of the lessor or a renewal of the lease."

Harris v. *Riggs,* 112 N. E. 36.

Again same case:

"The execution of a new lease under the facts of this case sufficiently shows the lessor's election to treat the first lease as annulled and in no sense binding on any of the parties thereto."

Here, Hopper for three years abandoned his lease and after a subsequent lessee has proven the ore deposits he cannot reassert any rights thereunder.

VI.

The court erred in its judgment decreeing relief to the plaintiffs and quieting their title against defendant herein, for the reason that the plaintiffs were not in possession of said lands or any part thereof at the time of the institution of the suit or subsequent thereto, and the court as a court of equity did not obtain jurisdiction to quiet title when the plaintiffs were out of possession and the defendant was in possession of the lands involved herein.

An examination of this record clearly shows no actual possession of this land was in the plaintiffs when the suit was instituted. A scrambling possession will not sustain a suit to quiet title.

VII.

The court erred in refusing to deny relief to plaintiffs on account of their false pleading.

The plaintiffs by their false pleadings are barred from relief in a court of equity.

Plaintiffs plead: "That *immediately upon the execution and delivery of the said mining lease,* Exhibit C, by the said Leander J. Fish to the said Dallas Hopper, *the said Dallas Hopper entered into possession of the said premises* under and pursuant to the terms and conditions contained in said mining lease, *and ever since said time he and his assignees and now these plaintiffs have remained in continuous possession of said premises;* that pursuant to the terms of said lease they have prospected and developed said land and have *sunk numerous test or drill holes* upon said land, and have *sunk a shaft* thereon and *improved* and *developed the same for mining purposes.*"

This allegation was false and known to be false by the plaintiffs. McCullough in his testimony, as we have shown, admitted it was false.

Parties coming into a court of equity must come with clean hands and in good faith. We have demonstrated the bad faith of plaintiffs beyond a doubt.

The Supreme Court of Oklahoma discusses similar conduct in *Bearman* v. *Dux Oil & Gas Co.,* 166 Pac. 203, and says:

> "It is a rule of equity that, 'He who comes into equity must come with clean hands,' and another rule is, 'He who has done iniquity cannot have equity.' Equity demands of suitors applying for relief that they come with clean hands and right conduct with reference to the matters concerning which they seek relief. In *Michigan Pipe Co.* v. *Fremont, etc., Co.,* 111 Fed. 284, 49 C. C. A. 324, the rule is stated by Sanborn, J., as follows:
>
> 'A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion, not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims,

"He who comes into a court of equity must come with clean hands," and "He who has done iniquity cannot have equity." A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transactions concerning which he seeks its aid, has been wanting in *good faith,* honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of *bad faith,* fraud, or any unconscionable act in the transaction which forms the basis of his suit.'

In *Dewesse* v. *Reinhard,* 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757, Mr. Justice Brewer, speaking for the court, said:

'A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.'

In Eaton on Equity, p. 74, it is said:

'Equity will refuse its aid in the enforcement of a contract where the plaintiff has practiced fraud on the defendant, and also where the plaintiff has been guilty of any unconscionable conduct which does not amount to legal fraud.'

In Pomeroy, Equity Jurisprudence, Sec. 398, the rule is stated thus:

'It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscionable conduct connected with the controversy to which he is a party will repel him from the forum whose very foundation is good conscience.'

In *Angle* v. *Chicago, etc., Ry. Co., supra,* it is said:

'A wrongful use of the powers and processes of the court cannot be recognized as among the legitimate means of contest and competition.'

Tested by these precepts, the plaintiff's conduct clearly shows that it is not entitled to the relief it seeks. It failed to pay the rentals when due, as it had previously done, and as required by its contract, after repeated demands for the payment thereof and after notice that its lease had been forfeited and that another lease had been made. Not until a producing well had been brought in close to the leased premises did it deposit the past due rentals in a bank to the credit of the lessor, and after said rentals had been rejected it sent its farm boss to take possession of the premises. Posses-

sion being denied by the lessor, it then applied to a court of equity for a temporary injunction, *making the false allegation that it was in possession of the premises,* and had much timber thereon, and that defendants were interfering with its possession. Upon these allegations, which were untrue, and made for the purpose of obtaining the process of the court to enable it to regain possession, plaintiff caused a temporary writ to issue, restraining the defendants from interfering with its alleged possession. The trial court found that plaintiffs sued out said writ for the purpose of obtaining possession. In view of these facts, it appears that plaintiff has not acted in good faith in an honest endeavor to perform its contract according to the terms thereof, but had abandoned any rights which it had under the lease, and that it was only after it appeared probable that the premises were valuable by reason of the producing well in the vicinity that it sought to assert rights which it had abandoned and which had been declared forfeited by the lessor; *and that it imposed upon a court of equity by misrepresenting the true facts* and by use of its process obtained a possession to which it was not entitled and has under such possession so wrongfully obtained, asserted rights which had been forfeited, we say that plaintiff has not come into equity with clean hands, and has not done equity, and is not entitled to any relief."

VIII.

The court erred in finding and adjudging all issues in the case for the plaintiffs and against this defendant and in granting the relief prayed for, because the evidence does not sustain such finding and judgment and should have been for the defendant.

For the reasons heretofore stated, we submit the judgment of the court should have been for the defendant. Also:

The Equities Are All With The Defendant Smith.

The defendant on November 4, 1912, secured his lease on the east half of the northwest quarter and the west half of northeast quarter of Section 32, and on January 6, 1913, secured a lease on the southeast quarter of the northeast quarter of Section 32. The Montreal forty is the northwest quarter of the northeast quarter, and included in the first lease. It cannot be said that prospecting and mining on the Montreal forty would not be satisfaction

of the covenants to mine under the first lease. We believe the trial court was wrong in intimating that any work done on this Montreal forty by Smith or his tenants was not competent to show development under the lease and that it was error for the court to refuse the offer of testimony showing the large expenditure of money and the extent of development on the Montreal forty at least prior to the filing of this suit.

Defendant had prepared a very complete map of this Fish tract, showing all drilling done thereon with computations of expense thereof on each forty, and same would have been very helpful to the court, but it was excluded.

The evidence is that Smith in the summer of 1913 drilled about 1000 feet on the lands described in his first lease (R. 204); that in July, 1914 (R. 287) Church and Mabon took a contract for a lease from Smith on the entire tract of 200 acres (Defendant's Exhibit 4) and as a result of discoveries thereunder a mining lease was made to them in July, 1915 (Exhibit 5, R. 288).

Mr. Plumb said (R. 182-203) that October 1, 1914, he went to work for Church and Mabon and as engineer had charge of all their operations; that prior to his employment Church and Mabon had drilled on this land four holes; that at least twelve holes drilled by Church and Mabon were on the 120 acre tract, and prior to May 5, 1915, and this witness produces the logs and located the holes on the defendant's Exhibit 6; that the balance of the holes, 34 in all, were drilled on the Montreal forty, and he supervised all except the first four.

This witness is not guessing—he is an experienced and successful mining engineer and produces logs (293-301) and assays and corrects position of every hole drilled. He was an employee of a mining company of standing. He is not an habitue of pool rooms nor is it necessary for Smith to support him by the testimony of pool room experts.

Plumb further says he was on this ground every day; that prior to May 5, 1915, when he made the first strike, no other person was operating on any part of the Fish land; that after the strike Beth came on the ground and claimed the lease and shortly thereafter Hopper started his "shaft" up in the brush.

We have seen that the plaintiffs have testified positively that there had been no drilling on these lands prior to their alleged entry on May 5, 1915, but here is a reputable engineer testifying

that he was on the ground daily in charge of the drills and produces logs of the holes in detail and in most cases the original logs show the dates and assays. There was no attempt to contradict this witness. The logs set out at length (R. 293-301) show the character of work done by and under the defendant. While the plaintiffs claim they did drilling they offer not one single log as evidence.

The witness further shows that there was drilled on the southeast quarter of the northeast quarter 12 holes costing $1358.10, under Smith's lease; that on the Quebec forty there were 3 holes drilled before the 5th day of May, 1915, and at least 14 holes before this suit was brought, and all under the Smith lease and a part of the 120 acre tract involved here; that after the suit was filed at least 18 holes were drilled on the Quebec forty, making about 32 holes on one forty of the 120 drilled under Smith; that as a result of the Smith drilling on the Quebec forty a rich strike was developed, a large mill built upon it, and now being operated by Quebec Mining Co. under the Smith lease; that under Smith drilling of 32 holes at a cost of $6927.85 has been done on the Quebec forty and that 14 of these holes were drilled before this suit was filed; that on the forty south of the Quebec (involved herein) 29 holes were drilled under Smith at a cost of $7145.00; that on the forty immediately east 15 holes were drilled at a cost of $2582.10; *that there were drilled under the Smith lease 73 holes on the lands involved in this suit;* that Smith has drilled under his lease on the Fish tract *199* holes at a cost of $41,619.-00 (R. 199).

This testimony needs no comment. It overwhelmingly establishes one thing; that Smith and his tenants are miners, business men, honestly spending their time and almost $50,000.00 trying to develop the Fish land and not laying in wait for some one to take all the chances and claim it if it is successful at an expense of $25.00 per month.

Mr. Shelton (R. 206-208) said he was manager of the Quebec Mining Company, mining the Quebec forty; that they had built a 300 ton mill on the land with two shafts with an investment of $150,000.00.

There is no attempt by plaintiffs to deny the testimony of Mr. Plumb and Mr. Shelton. It is admitted that through Smith

at least $190,000.00 has been expended in prospecting, developing and improving the lands *involved here*, exclusive of the Montreal.

Mr. Dike, manager of the Montreal (R. 164-166) adds to this sum the amount of $25,836.25 expended by his company before this suit was filed. This was under the Smith lease. He further says his total investment or expenditure on this 40 up to date were over $800,000.00, and he had mined about $1,700,000.-00 worth of ore; that their total investment for plant, betterments, equipment and development was $243,982.82.

The above is sufficient reference to the testimony that we may get an insight into the real costs of mining underground in this field. Smith and his tenants mine underground. There is another class in every mining field that mine on top, and some do it as cheaply as $25.00 per month, sinking numerous "shafts."

Courts of equity do not allow men, who may have had rights, to lay by, permit others claiming adversely to expend large sums of money, and if success attends the effort then to claim the fruits of such hazard, and the rule is applied with special rigor in mining cases.

In the case of *Johnson* v. *Standard Mining Company*, 148 U. S. 360, the court, at page 370, said:

> "The duty of inquiry was all the more peremptory in this case from the fact that the property itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. A property which in October, 1880, plaintiff sold to Chatfield upon the basis of $4800.00 for the whole mine is charged, in a bill filed October 31, 1887, to be worth $1,000,000, exclusive of its accumulated profits. Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights. *Felix* v. *Patrick*, 145 U. S. 317, 334; *Hoyt* v. *Latham*, 143 U. S. 553; *Hammond* v. *Hopkins*, 143 U. S. 224; *Great Western Mining Co.* v. *Woodmas Mining Co.*, 14 Colo. 90.
>
> The language of Justice Miller in *Twin Lick Oil Company* v. *Marbury*, 91 U. S. 587, 592, with regard to the fluctuating value of oil wells, is equally applicable to mining

losses; 'Property worth thousands today is worth nothing tomorrow; and that which today would sell for a thousand dollars at its fair value, may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.' "

Again, in the case of *Patterson* v. *Hewitt*, 195 U. S. 309, 320, the court announced the same principle, as follows:

"To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

We ask the court to read defendant's Exhibit 1, Record 271-281, which is the petition of McCullough and Landrum in the state court *after filing the case at bar*. There they set out at length the very leases held and claimed by the defendant here and seek an accounting and money judgment against this same defendant, and on the theory they held subleases from Smith under which the ore deposits were discovered. They at the same time were pressing the suit at bar, seeking cancellation of the Smith leases on the theory they were void and they held a superior lease. The trial court has ordered Smith's leases canceled although the same

Smith was defending a suit in the state court brought by McCullough and Landrum claiming a royalty interest in and under the now canceled leases. It was the old game of "catching Smith coming *and* going." Will a court of equity lend its aid to men assuming such inconsistent and dishonest positions? They play fast and loose with the Indian's rights, tying up his land for speculation with mere pittance payments, slumber for more than three years, while defendant develops the property, and then file two suits almost simultaneously in different courts, with one attacking Smith's leases and the other asserting their validity, and the right to share in their fruits. All this time the buying and selling of small undivided interest in the Hopper lease goes on. Is it possible a court of equity is to be made the instrument of wrongdoing by permitting an innocent man, who mines and develops in good faith, to be mulcted in this manner?

We have assigned other errors, but the points raised and contentions made herein all fall within the errors complained of and presented.

Conclusion.

We believe we have shown that there has been substantial error in the trial of this cause, and that we have established:

1. That the lease under which plaintiffs claim title was void *in toto* because it was violative of the policy of the United States Government toward its Indian wards as expressed in the Act of Congress approved March 2, 1895, *supra*, and that of June 7, 1897, *supra*.

2. That this being true, the motion to dismiss plaintiffs' bill should have been sustained.

3. That plaintiffs by their conduct in the state court proceedings in asserting the validity of and claiming an interest in the mining leases of Smith here sought to be cancelled, bars them from any relief in this court sitting as one in equity.

4. That the court should have permitted defendant to file his amended answer setting up facts of record uncontroverted by the plaintiffs, establishing the conduct of plaintiffs in said court proceedings.

5. That the evidence did not show that plaintiffs had paid the five cents per acre to the allottee.

6. That the evidence fails to show that the plaintiffs own the Hopper lease.

7. That the Hopper lease was abandoned by the lessee named therein and his assignees.

8. That there was no possession of plaintiffs of the character required to maintain a suit in equity in the Federal Courts to quiet title.

9. The plaintiffs' pleading of the taking of immediate possession was known to be false by the plaintiffs when they filed the petition herein, and for this reason equity should deny them relief.

Respectfully submitted,

ARTHUR S. THOMPSON,
Miami, Oklahoma,
Solicitor for Appellant.

POSTPONED TO MERITS

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No. 22

IN THE

Supreme Court of the United States.

OCTOBER TERM, [redacted] 1925

WESLEY M. SMITH, APPELLANT,

VS.

W. P. McCULLOUGH, B. E. BETH, THOMAS F. PHILLIPS, FRANK GAINES, THERESA McCLELLAND, A. C. TOWNE, AND PAUL A. EWERT, APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS APPEAL.

PAUL A. EWERT, Joplin, Mo.,
A. C. TOWNE, Miami, Okla.,
JAMES DAVENPORT, Vinita, Okla.,
W. M. JACKSON, Fort Scott, Kans.,
W. R. KING, Washington, D. C.,
Attorneys for Appellees.

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W. P. McCULLOUGH, B. E. BETH, THOMAS F. PHILLIPS, FRANK GAINES, THERESA McCLELLAND, A. C. TOWNE, AND PAUL A. EWERT, APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS APPEAL.

Appellees respectfully move the court to dismiss the appeal herein for the want of jurisdiction in this court to entertain the appeal because the record discloses that there are no questions of law involved under the judiciary act and the laws of the United States, and because the pleadings in the case plainly disclose the fact that no Federal questions are involved, nor is there involved the construction of any Constitutional provision or law or treaty of the United States.

STATEMENT.

The plaintiffs, W. P. McCullough, *et al.*, first filed their amended bill of complaint herein in the United States District Court in and for the Eastern District of Oklahoma under date of September 11th, 1916. On the same day the defendant, Wesley M. Smith filed his motion to dismiss the said bill of complaint. On September 12th, 1916, the Court sustained the motion to dismiss and on said date entered and filed its decree dismissing the plaintiffs' bill. By proper proceedings the case was appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and under date of June 20, 1917, that Court reversed the said decree and ordered the cause remanded with directions that the court should overrule the motion to dismiss the bill of complaint and permit the defendant, if so desired, to answer and proceed to trial.

McCullough v. *Smith*, 243 Fed. 823.

On November 15, 1917, the defendant, Wesley M. Smith, filed his answer and on November 26, 1917, the plaintiffs filed their reply to said answer.

All the questions of law were disposed of by the decision of the Circuit Court of Appeals, *supra*, and the case went to trial purely upon the questions of fact involved, upon the 18th day of April, 1919, in the District Court of the United States for the Eastern Dis-

trict of Oklahoma, before the Honorable Robert L. Williams, District Judge.

On the 2nd day of July, 1919, the Court made its order submitting the cause on briefs, and on the 29th day of September, 1920, the Court filed his order on the issues of fact and questions of law, which was in the following language, to-wit:

> "I find the issues of fact and also the questions of law in favor of the plaintiffs. The attorneys in the case are directed to prepare and submit to the Court a decree accordingly."

A decree was entered on the 30th day of October, 1920, in favor of the plaintiffs. By proper proceedings the defendant appealed the case to the United States Circuit Court of Appeals for the Eighth Circuit, and under date of December 23rd, 1922, the Circuit Court of Appeals, speaking through Circuit Judge Sanborn, affirmed the decree of the trial Court.

Smith v. *McCullough*, 285 Fed. 698.

By proper proceedings the defendant, Wesley M. Smith has appealed the case to this Court. The record has not been printed in this Court but a certified transcript of the record on appeal is made up of the entire record of the trial of the case on both appeals to the Circuit Court of Appeals of the United States, and in this motion to dismiss reference must be made to those printed records now on file in the office of the Clerk of the Supreme Court of the United States.

BRIEF.

This Court Has No Jurisdiction Because No Appealable Questions Are Presented to the Court and the Appeal Should Be Dismissed.

The appellees contend that the appeal should be dismissed because there are no appealable questions presented by the record to this Court by the pleadings and the proceedings had thereon in the trial Court and in the United States Circuit Court of Appeals for the Eighth Circuit. This fact is readily ascertainable from the pleadings and the two opinions of the Circuit Court of Appeals of the United States, first, the opinion of the Court in passing upon the questions of law involved, *McCullough* v. *Smith*, 243 Fed. 823, and on the second appeal, *Smith* v. *McCullough*, 285 Fed. 698.

The amended bill of complaint, the answer, and the reply as found in the printed Transcript of the Record on the second appeal, pages 1 to 23 inclusive, are as follows, to-wit (Captions omitted):

Amended Bill of Complaint.

Complainants complain of the defendant and for their cause of action allege:

I.

That the complainants W. P. McCullough and T. F. Phillips are respectively citizens and residents of the State of Oklahoma; that the complainant D. E. Beth is a

citizen and resident of the State of Kansas; that the defendant W. M. Smith is a citizen and resident of the State of Kansas residing at Baxter Springs in the State of Kansas; that the value of the subject matter in controversy herein is in excess of the sum of Three Thousand Dollars ($3,000), exclusive of costs and interest; that the value of the right to possession of the mining lands the subject of this suit, under and pursuant to the terms and conditions of the mining lease under which complainants claim, is in excess of the sum of Three Thousand Dollars ($3,000), exclusive of costs and interest

II.

That under and pursuant to that portion of the Act of Congress of the United States approved March 2 1895, being a part of the Indian Appropriation Act for the year 1895 (28 Stats., page 927), providing for the allotment in severalty of certain lands theretofore set apart for the use of the Quapaw Tribe of Indians, and the individual members thereof, there was allotted to Leander J. Fish the following described lands (and other lands), to-wit:

> The East One-half of the Northwest One-fourth, and the Southeast One-fourth of the Northeast One-fourth of Section Thirty-two, Township Twenty-nine, Range Twenty-three, East of the Indian Meridian, Ottawa County, Oklahoma, containing 120 acres.

III.

That thereafter, to-wit: On the 26th day of September 1896, the United States of America, pursuant to

and under the terms and conditions contained in the said Act of Congress, in due form issued to and in favor of the said Leander J. Fish a certain allotment patent in and to the hereinbefore described lands, said lands being located in what is now Ottawa County, Oklahoma, in the Eastern Judicial District of Oklahoma.

IV.

That thereafter the Congress of the United States passed a certain act, which was duly approved and became a law on June 21, 1906 (34 Stats., 325-344; Kappler's Indian Laws and Treaties, Vol. 3, page 211), as follows, to-wit:

> "That Leander J. Fish, an allottee of two hundred acres of land in Section Thirty-two, Township Twenty-nine, Range Twenty-three, East, and of forty acres in Section Fourteen, Township Twenty-nine, Range Twenty-four East, in the Quapaw Reservation, under the provisions of the Act of March second, eighteen hundred and ninety-five (Twenty-eight Statutes, page nine hundred and seven), and the Act of March third, nineteen hundred and one (Thirty-first Statutes, page ten-hundred and fifty-eight), be, and he is hereby authorized to alienate such portion of said land as he may see fit, not exceeding one hundred and twenty acres, under such rules and regulations as the Secretary of the Interior may prescribe, and any conveyance of such land made by said Fish shall be executed subject to the approval of the Secretary of the Interior."

V.

That thereafter, to-wit; On the 14th day of July, 1906, the said Leander J. Fish availed himself of the

provisions of the said Act of Congress, and by and with the consent and approval of the Secretary of the Interior did alienate a portion of his said land, under and pursuant to the terms of the said act, described as follows, to-wit:

> The East one-half of the Northwest one-fourth, and the Southeast one-fourth of the Northeast one-fourth of Section Thirty-two, Township Twenty-nine, Range Twenty-three, East of the Indian Meridian, Ottawa County, Oklahoma, containing 120 acres.

and did make, execute and deliver to one E. V. Kellett of Seneca, Missouri, a certain deed to the said hereinbefore described land, with a defeasance clause thereunto attached, and said deed was thereafter, to-wit: On the 18th day of July, 1906, presented to the Department of the Interior of the United states and on said date recommended for approval by the Commissioner of Indian Affairs by indorsement on the said deed, as follows, to-wit:

> "The within alienation is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved. C. F. Larrabee, Acting Commissioner."

That thereafter, to-wit: On the 20th day of July, 1906, the said alienation was approved by the Honorable Secretary of the Interior of the United States by indorsement on the back of said instrument, as follows, to-wit:

> "Department of the Interior, Received July 20th, 1906. Enc. No. 1, 12746, Indian Territory

Division. Department of the Interior July 20th, 1906. The within alienation is hereby approved. Thos. Ryan, Acting Secretary."

That thereafter this instrument was filed for record in the office of L. D. Einsel, Deputy Clerk and *Ex Officio* Recorder for the recording district of the Northern District of Indian Territory, then located at Miami, Oklahoma, and there recorded on the 28th day of July, 1906, in Book F on pages 63-64 of said records, a copy of which said deed with defeasance clause attached, with the approval of the said alienation endorsed thereon by the Secretary of the Interior of the United States, is hereunto attached, marked Exhibit "A" and made a part of this Amended Bill of Complaint.

VI.

That thereafter, to-wit: On the 4th day of August, 1906, the said E. V. Kellett duly and lawfully assigned the said instrument of alienation, to-wit: Exhibit "A," to the Alliance Trust Company, Limited, of Dundee, Scotland, which said assignment was thereafter, to-wit: On the 15th day of August, 1906, filed for record in the office of L. D. Einsel, Deputy Clerk and *Ex Officio* Recorder for the Northern Recording District of Indian Territory, then located at Miami, Oklahoma, and there recorded on the records of said office in Book ..... on page ..... thereof; that thereafter, to-wit: On the 20th day of June, 1908, the said Alliance Trust Company, Limited, of Dundee, Scotland, in due form duly and lawfully re-conveyed the said premises to the said Leander

J. Fish by a deed of release and conveyance, a copy of which said deed of release and conveyance is hereunto attached, marked Exhibit "B" and made a part of this Amended Bill of Complaint.

That thereafter, to-wit: On the 24th day of July, 1908, the said deed of release and conveyance was duly filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book ..... on page ..... of the records of said office.

VII.

That thereafter, and on numerous occasions, the Honorable Secretary of the Interior of the United States, by his subsequent official acts with respect to said lands, ratified and conformed said alienation and recognized it as an alienation under and pursuant to the provisions of the Act of Congress of June 21, 1906, *supra*.

VIII.

That thereafter, to-wit: On the 29th day of April, 1912, the said Leander J. Fish made, executed and delivered to one Dallas Hopper of Miami, Oklahoma, a certain mining lease, wherein and whereby he leased unto the said Dallas Hopper for mining purposes the hereinbefore described lands, a copy of which lease is hereunto attached, marked Exhibit "C," and made a part of this Amended Bill of Complaint; that thereafter to-wit: On the 29th day of April, 1912, the said mining lease so made, executed and delivered, was by the said Dallas

Hopper filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book 31 on page 167 of the records in said office.

IX.

That thereafter, and prior to the beginning of this action, the said Dallas Hopper assigned all his right, title and interest in and to said mining lease to these plaintiffs, and they are now the owners and holders of said lease and in possession of the said hereinbefore described land, under and pursuant to the terms and conditions thereof; that immediately upon the execution and delivery of the said mining lease, Exhibit "A," by the said Leander J. Fish to the said Dallas Hopper, the said Dallas Hopper entered into possession of the said premises under and pursuant to the terms and conditions contained in said mining lease, and ever since said time he and his assignees and now these plaintiffs, have remained in continuous possession of the said premises; that under and pursuant to the terms of said lease they have prospected and developed said land and have sunk numerous test or drill holes upon said land, and have sunk a shaft thereon and improved and developed the same for mining purposes.

X.

That these plaintiffs claim a leasehold interest in and to said premises under the said mining lease, Exhibit "A," and the defendant claims an estate or interest

therein adverse to these plaintiffs; that the claim for the defendant is without any right whatever, and that the said defendant has no estate, right, title or interest whatsoever in said land or premises or any part thereof.

Wherefore: Plaintiffs pray that the defendant be required to make due answer to Plaintiffs' Amended Bill of Complaint herein (but not under oath, answer under oath being hereby expressly waived); that he be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by decree of this court; that by the said decree it be declared and adjudged that the defendant has no estate or interest whatsoever in and to said land and premises, and that the title of the plaintiff is good and valid, under their said mining lease, Exhibit "C," that the defendant be forever adjudged and debarred from asserting any claim in and to said land and premises adverse to the plaintiffs and that the said mining lease or instrument, under which the said defendant claims an interest in said lands, be declared null and void and cancelled of record, and for such other and further relief as to the Honorable Court shall seem meet and agreeable in equity and good conscience, together with the costs and disbursements of this action.

PAUL A. EWERT,
405-406 Frisco Building,
Joplin, Missouri,
Attorney for Plaintiffs.
A. C. TOWNE,
Miami, Oklahoma,
Attorney for Plaintiffs.

"EXHIBIT 'A.'

Mortgage.

Leander J. Fish to E. V. Kellett.

Know all Men By These Presents, That I, Leander J. Fish, a single man, for and in consideration of the sum of one dollar ($1.00) to me in hand paid, and the premises hereinafter set forth, do hereby grant bargain and sell unto E. V. Kellett, of Seneca, Mo., and unto his heirs, and assigns forever, the following property: The Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section 32, Township 29, North of Range 23, East, being in all one hundred and twenty acres (120) more or less, situated in the Quapaw Reservation, Indian Territory being that part of my allotment of 240 acres of land made under the act of February 3rd, 1897, and February 19th, 1903, which I am authorized to alienate under the provisions of the Act of Congress approved June 21st, 1906.

And I hereby convenant with the said E. V. Kellett, that I will forever warrant and defend the title to said property against all lawful claims. The sale is on the condition that whereas Leander J. Fish, is justly indebted to the said E. V. Kellett, in the sum of One Thousand Dollars ($1,000) evidenced by a certain promissory note dated July 12th, 1906, which is in words and figures following, $1,000.00 Washington, D. C., July 12th, 1906. Three years after date I promise to pay to the order of E. V. Kellett, One Thousand Dollars ($1,000) at the First National Bank of Seneca, Mo.,

value received with interest at 9 per cent per annum payable semi-annually until paid.

(Signed) Leander J. Fish.

Now, if I shall pay said moneys at the time and in the manner aforesaid, then the above conveyance shall be null and void, and in case of non-payment then the said grantee or assignee shall have the power to sell said property at public sale to the highest bidder for cash, at Wyandotte, in the Quapaw Agency in the Indian Territory. Public notice of the time and place of said sale having first been given ten days by advertising in some newspaper published in said Territory by at least two insertions or by notices posted in public places in the Quapaw Reservation, at which sale the said grantee or his assignees may bid and purchase as any third person might do. I hereby authorize the grantee or assignee to convey said property to any one purchasing at said sale, and to convey an absolute title thereto, and the recitals of his deed of conveyance shall be taken as *prima facie* true, and the proceeds of said sale shall be applied, first, to the payment of all costs and expenses attending said sale. Second, to the payment of said debt and interest, and the remainder if any shall be paid to the said grantor.

Witness my hand and seal on this 14th day of July, 1906.

Leander J. Fish.

(Witnesses) J. D. Yoakley.

(Verification.)

EXHIBIT "B."

Alliance Trust Company to Leander J. Fish. Loan No. 2281.

For value Received, The Alliance Trust Co., Limited, (Corporation duly incorporated and organized under the Laws of Great Britton and Ireland), of Dundee, Scotland, does hereby acknowledge full payment and satisfaction of one certain mortgage made and executed by said Alliance Trust Company, Limited, on the following described land situate in the Quapaw Reservation, Indian Territory, viz.

NE4 of NW4 of SE4 of NW4 and the SE4 of NE4 Section 32, Township 29, Range 23, East.

Bearing Date July 14th, 1906, and recorded in the records of First Recording District I. T., in Book F. of ..... on page 63, on the 28th day of July, 1906, A. D. and hereby release the premises therein described from the lien of said mortgage and said trustee hereby *recovers* said premises to the makers said mortgage their heirs and assigns.

In Testimony Whereof, it has caused these presents to be signed in its behalf by George Murray, its true and lawful attorney in fact, and said trustee has hereto set his hand and seal this 20th day of June, 1908.

The Alliance Trust Company, Limited (Seal),
by GEORGE MURRAY,
Its Attorney In Fact."

(Verification.)

EXHIBIT "C."

This Indenture, Made and entered into this 29th day of April, A. D. 1912, by and between Leander J. Fish, of the Quapaw Reserve, in Oklahoma, an allottee of the Quapaw Tribe of Indians, party of the first part, and Dallas Hopper, of Miami, Party of the second part:

Witnesseth: That the said party of the first part for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part receipt of which is hereby acknowledged, in consideration of the rents or royalties, undertakings and agreements hereinafter stated to be paid and performed by the said party of the second part, his successors, assigns, and sublessees, does by these presents demise and lease unto the party of the second part, successors and assigns, and sublessees the following described tracts or parcels of land, viz:

> East half of Northwest Quarter and the Southeast Quarter of the Northeast Quarter of Section 32, Township 29, Range 23, East of the Indian Meridian, Oklahoma, containing One Hundred and twenty acres more or less for the term of ten years from the date hereof,

for the purpose of prospecting, mining, drilling, boring, or digging for oil, gas, asphaltum, lead, zinc, coal and copper and all every other kind or kinds of valuable minerals, ore, fossil, or vegetable substance whatever, with the right to use as much of the surface of said land and so much of the building stone found thereon as may be properly needed to successfully conduct said prospecting

and mining operations, also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery, pipe lines upon said premises for successfully carrying on the business of boring, prospecting, mining and prosecuting the object of this indenture, with the right to remove or sell and remove all of said buildings, refineries, machinery and pipe lines, at any time or at the expiration of this lease.

In case there shall not be found in any well so drilled oil, gas, coal, copper or other substances in paying quantities, then the said party of the first part to have said well for his own use, and party of the second part agrees to leave said well in good shape for water, provided said first party pay for the casing therein contained or furnish new casing of the same quality to the second party, if oil mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals, or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease.

Party of the first part reserves the right to go upon and visit said lands and mines at such times as may be desired to examine and ascertain the amount of product mined or produced thereon, said second party to have the free use of gas, oil, or coal to operate said property.

In consideration of which the said party of the second part agrees and binds his executors, administrators, assigns, and sublessees to pay or cause to be paid to the party of the first part his executors, administrators, or assigns, at Miami, Oklahoma, a sum of money equal to 5% *per centum* of the market value at the place mined or produced, of all oil, gas, asphaltum, lead, zinc, coal, copper and all other minerals or substances whatever, which may be mined or removed by the said party of the second part, his executors, administrators, assigns, or sublessees from said land herein leased, and such payments, or royalties or rent shall be made on or before the 15th day of each calendar month during the continuance of this lease for all oil, gas, asphaltum, ore and mineral products and substances above named, mined or removed from the land during the calendar month last preceding such date of payment.

Said party of the second part further convenants and agrees to exercise diligence in conducting said prospecting and mining operations, and to drill, bore, prospect, open and operate oil well, shafts, drifts and mines for the ores, minerals, products and substances above indicated, in workmanlike manner, and the said party of the second part further covenants and agrees that he will keep an accurate account of said mining operations, showing the whole amount of oil, ores, etc., mined or removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information de-

sired to the amount of products mined or removed from said land under this lease.

The party of the second part hereby agrees to begin operations on the above described premises within 90 days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5c per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same.

In Witness Whereof, the parties of the first and second parts have hereunto set their hands, and seals the day and year first above written.

Leander J. Fish, (Seal)
Dallas Hopper. (Seal)"

Signed and sealed in the presence of M. Duffee, J. C. William.

(Verification.)

"Answer.

Comes now the defendant, and for his answer to the allegations of the plaintiffs' petition, admits, denies and avers as follows:

I.

This defendant admits all of the allegations in paragraphs one, two, three, four, five, and six, of the plaintiffs' petition.

II.

This defendant denies all the allegations of paragraph seven of plaintiffs' petition, and avers that it is not true, as by the plaintiffs averred, that the Secretary of the Interior of the United States by his official act with respect to the land in controversy ratified and confirmed the transfer in the plaintiffs' petition alleged as an alienation of said land, under and pursuant to the provisions of the Act of Congress of June 21, 19[illegible] but that in truth and in fact the said Secretary of the Interior and the Commissioner of Indian Affairs has never by their official act recognized the conveyance set out by plaintiffs as an alienation of the land therein described, removing the restrictions from said land under the Act of Congress.

III.

This defendant denies and says that it is not true that Leander J. Fish on the 29th day of April, 19[illegible] executed and delivered to one Dallas Hopper the mining lease described in the plaintiffs' petition, but this defendant avers the facts in that behalf to be that on or about the 29th day of April, 1912, the said Leander J. Fish and the said Dallas Hopper entered into an agreement whereby and by the terms of which the said Dallas Hopper agreed with the said Leander J. Fish that he would pay to said Leander J. Fish, the sum of Six[illegible] five Dollars, in cash, at the time, and would procure one W. A. Wagoner, a citizen of the City of Miami, Oklahoma, and who was financially responsible to endorse

sign as security a promissory note to be made by the said Leander J. Fish for the sum of Three Hundred Dollars with which the said Leander J. Fish under said agreement with the said Dallas Hopper was to purchase from one Forrest Rallings a team of horses; that pursuant to said agreement, and in reliance upon the performance thereof by the said Dallas Hopper, the said Leander J. Fish, on the 29th day of April, 1912, signed and acknowledged the lease described at paragraph eight of the plaintiffs' petition and attached to their petition as Exhibit C; that the said lease was left with a notary public for the said Hopper to perform his part of the said contract.

That thereupon and within a short time thereafter the said Dallas Hopper informed the said Leander J. Fish that the said W. A. Wagoner declined to become the security of said Leander J. Fish for the said money with which to purchase the said team of horses, wagon and harness, and the said Dallas Hopper informed the said Leander J. Fish that he could not then pay the Sixty Five Dollars in cash.

That thereupon it was agreed between the said Leander J. Fish and the said Dallas Hopper that said lease should be held by the said notary, or placed in a bank awaiting the performance of the said agreement by the said Dallas Hopper, and that the said Dallas Hopper would undertake to procure some one else financially responsible to sign said note with the said Leander J. Fish, that he might complete the purchase of said team, and would obtain the Sixty-Five Dollars in cash for the

said Leander J. Fish, and this defendant avers that for several days prior to said transaction thus narrated the said Dallas Hopper pretended to be making efforts to procure said security for said Fish and to obtain the Sixty-Five Dollars with which to pay the said Fish, but the defendant avers that the said Dallas Hopper never in fact performed said agreement, and the defendant avers that after several days had elapsed, just how long to this defendant is unknown, that said Leander J. Fish learned that the said Dallas Hopper had at the very time he was negotiating with the said W. A. Wagoner to sign the said note, surreptitiously taken said lease and placed the same upon the records of Ottawa County, Oklahoma, without the knowledge or consent of the said Leander J .Fish.

This defendant avers that thereafter the said Leander J. Fish sought the said Hopper for the purpose of obtaining from him a cancellation of said lease upon the records of Ottawa County, Oklahoma, and that after the elapse of considerable time the said Leander J. Fish met the said Hopper in the City of Miami, Ottawa County, Oklahoma, having prepared a blank release of said lease for the execution of the said Hopper, and presented the same to the said Hopper and requested that he sign and execute the same, as a release, and thereupon the said Hopper stated to the said Leander J. Fish that he claimed no interest in the lease, as he had failed to comply with his contract, and that he would execute a release cancelling the said lease on the records of Ottawa

County, Oklahoma, but that he was in a hurry at that particular time, but would in a few days execute the said release.

This defendant avers that the said Leander J. Fish thereafter regarded said lease as having been cancelled and surrendered by the said Dallas Hopper, and thereafter executed to this defendant the mining lease hereinafter by this defendant set out.

That as to the matters and allegations of paragraph nine, the defendant says that whether the plaintiffs were at the date of the filing of this petition herein the owners and holders of said lease so made to Hopper he has no knowledge as to the truth of said allegations, but avers that plaintiffs are not the sole owners of said lease at the present time; that he denies at the time of filing of this suit the plaintiffs were in possession of said land; that he denies that said Dallas Hopper upon the execution of said lease immediately entered into possession of said land, and denies that plaintiffs or their assignors have been in possession continously since the execution of said lease, and denies that plaintiffs, or their assigors, have prospected and developed said land, or sunk numerous test holes upon said land, or have sunk a shaft thereon, or improved and developed said land for mining purposes.

IV.

The defendant, for further answer says that said Hopper's lease was secured by fraud, as heretofore alleged, and that for at least three years thereafter said

Hopper and anyone claiming under him abandoned said lease, considered it of no value, and did no work, prospecting, or development on said premises until after the death of Leander J. Fish, and some time in the spring of 1915; that prior thereto and on the 4th day of November, 1912, the said Leander J. Fish, in full reliance that said Hopper was not claiming any rights upon his said land, under the lease so as aforesaid, obtained by the said Dallas Hopper, executed to this defendant a mining lease on part of the said described lands, and other lands of the said Leander J. Fish, a copy of which said lease is hereto attached marked Exhibit A, and made a part hereof, and on the 6th day of January, 1913, executed to the defendant a mining lease on that part of the land described in plaintiff's petition not leased by the said Exhibit A, a copy of which said lease is hereto attached, marked Exhibit B, and made a part hereof.

Defendant avers that he entered upon the said land pursuant to the terms of said lease and mined and carried on mining operations, at all times had possession and dominion of said land for the purpose of performing the conditions and terms of his said lease, and by himself and his sublessees drilled said land, putting down a large number of test drill holes, from the date of said lease until the spring of 1915, at which time pay ore was struck on said leased land by the defendant's sublessees, and thereupon and for the first time the said Dallas Hopper made a claim of right to mine said land under the lease so as aforesaid obtained from the said Leander J. Fish, but did not thereafter prospect in good

faith on said land and that neither the said Dallas Hopper, nor his assignees have in good faith sought to obtain the possession of said land for the purpose of mining the same, but have from time to time sporadically gone on some part of said land and dug a shallow hole, then left and after a time would surreptitiously return and go upon another part of said land and dig another shallow hole on some part of same merely intending to keep up an appearance of making claim to possession of said land, but has never had and have not any possession of any part of said leased premises.

That since entering upon said land the defendant has been prospecting and developing said land so leased in good faith and almost continuously, and has expended and caused to be expended in such prospecting and developing and improving such leased lands at least the sum of $175,000.00, and that at least $40,000.00 of this amount was expended prior to the filing of this suit, and further avers that this defendant by and through his tenants have produced and sold from the lands so leased to this defendant lead and zinc ores of the approximate value of $800,000.00 and that by reason of such efforts and expenditures this defendant has caused to be developed on said lands so leased one of the richest mines in the mining district.

The defendant further avers that plaintiffs since the filing of this suit have as aforesaid and are now in bad faith attempting to embarrass the defendant and his tenants by forcibly taking possession of certain parts of

said land so leased, and threatening bodily harm to said tenants if interfered with and all of such acts have been repeated several times since the filing of this suit, and said plaintiffs, or some of them, since the filing of this suit have executed numerous assignments of the Hopper lease, or an interest therein, and have had same recorded, thereby seriously clouding the title of this defendant and that all of said acts have been done with the object only of so clouding the title and embarrassing the defendant so that he would be forced to buy their pretended claims.

Wherefore, defendant prays the judgment of the court that the plaintiffs take nothing by their suit, and that the court adjudge that the lease under which plaintiffs' claim was abandoned and that the defendant holds the first and valid mining rights upon said land, and that during the pendency of this suit the court grant a temporary injunction enjoining the plaintiffs, each of them, their agents, employes, and anyone claiming under or by them from going upon or attempting to enter possession of the lands involved herein and from in any way or manner interfering with the proper prospecting and development of said lands by the defendant and any person or persons claiming under him and for such other relief as to this court may appear equitable.

A. SCOTT THOMPSON and
H. W. CURREY,
Attorneys for Defendant.

(Vertification by W. M. Smith.)

EXHIBIT "A."

Mining Lease.

This Indenture, Made and entered into this 4th day of November, 1912, by and between Leander J. Fish, of Ottawa County, Oklahoma, party of the first part, and Wesley M. Smith of Baxter Springs, Kansas, party of the second part.

Witnesseth: That the said party of the first part, for and in consideration of One Dollar to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, and in consideration of the rents or royalties, undertakings and agreements hereinafter stated to be paid and performed by the said party of the second part, his successors, assigns, and sublessees, does by these presents demise and lease unto the said party of the second part, his successors and assigns, the following described tracts or parcels of land, viz:

> The East Half (E2) of the Northwest Quarter (NW4) and the West half (W2) of the Northeast quarter (NE4) and the of Section 32; Township 29; Range 23

east of the Indian Meridian, Ottawa County, Oklahoma, containing 160 acres more or less, for the term of ten (10) years from the date hereof, for the purpose of prospecting, mining, drilling, boring or digging for Oil, Gas, Asphaltum, Lead, Zinc and all and every other kind or kinds of valuable mineral, ore, fossil, or vegetable substance whatever, with the right to use so much of the surface of said land, and so much of the timber and

building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations; also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery, pipe lines, tanks, concentrating mills, mining derricks and pumping plants, for the business of boring, prospecting, mining and prosecute the object of this indenture, with the right to remove or sell any and all of said buildings refineries, concentrating mills, machinery and pipe lands, at any time, or at the expiration of this lease. In case there shall not be found in any well so drilled, oil, gas, zinc, lead or other substances in paying quantities, then the said party of the first part to have said well for his own use, and said party of the second part agrees to leave said well in good shape for water; provided said first party pay for the casing therein contained, or furnish new casing o fthe same quality of the second party. Party of the first part reserves the right to go upon and visit lands and mines at such times as may be desired to examine and ascertain the amount of product mined thereon.

In consideratin of which the said party of the second part agrees and binds his executors, administrators, assigns and sub-lessees to pay, or cause to be paid to the party of the firt part, his executors, administrators or assigns, at office of party of the second part, a sum of money equal to five per centum of the market value at the place mined or produced, of all Oil, Gas, Asphaltum,

Lead, Zinc, and all other minerals or substances whatever, which may be mined or remved by the said party of the second part, his executors, administrators, assigns, or sub-lessees from said land herein leased, and such payments, or royalty or rent shall be made on or before the 15th day of each calendar month during the continuance of this lease, for all ore, minerals, products and substances above named, mined or removed from the land during the calendar month last preceding such date of payment. Such payment of royalties to be paid at Baxter Springs, Kansas. Said party of the second part further covenants and agrees to exercise diligence in conducting said prospecting and mining operations, and to drill, bore, prospect, open and operate oil wells, shafts, drifts, and mines, for the ores, minerals, products and substances above indicated, in workmanlike manner. And the said party of the second part further covenants and agrees that he will keep an accurate account of said mining operations, showing the whole amount of oil, ore, etc., mined or removed, and that the party of the first part shall have the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired as to the amount of product mined or removed from said land under this lease.

The party of the second part hereby agrees to begin operations on the above described premises on or before June 30th, 1913, and in case such operations do not begin within said stated time, said second party agrees to pay to said first part 10 cents per acre yearly, for

each and every acre contained in this leae, in lieu of said work.

In witness whereof the said parties of the first and second parts have hereunto set their hands and seals the day and year first above written.

Leander J. Fish (Seal)
Wesley M. Smith (Seal)

(Verification.)

EXHIBIT "B."

Mining Lease.

This Indenture, Made and entered into this 6th day of January, A. D. 1913, by and between Leander J. Fish and Joseph P. Fish, of the first part, County of Ottawa, State of Oklahoma, party of the first part, and W. M. Smith of the County of Cherokee and State of Kansas party of the second part.

Witnesseth, That the said party of the first part, for and in consideration of the sum of Ten Dollars to them paid by the said party of the second part, the receipt of which is hereby acknowledged, and in consideration of the rents or royalties, undertakings and agreements hereinafter stated, to be paid and performed by the said party of the second part, his successors, assigns, and sub-lessee, do by these presents demise and lease unto the said party of the second part, his successors or assigns, the follwing described tracts or parcel of land situate in the Cunty of Ottawa, and State of Oklahoma, to-wit:

The Southeast quarter (SE4) of the Northeast Quarter (NE4) of Section thirty two (32) township twenty nine (29) Range twenty three East (23E).

containing in all forty (40) acres more or less for the term of ten years from the date hereof, for the purpose of drilling, boring, digging, prospecting and mining for oil, gas, lead, zinc, and all and every other kind or kinds of valuble mineral or ore, or fossil or vegetable substance whatever, with the right to use so much of the surface of said land and so much of the timber and building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations; also the right of way over and across said land whereon to construct and operate such line or lines of wagon or railroad as may be necessary to carry on and prosecute the object of this indenture; also the right to erect buildings, refineries, machinery and pipe lines upon said premises, for successfully carrying on the business of boring, prospecting and mining, and proecuting the objects of this indenture, with the right to remove or sell any and all said buildings, refineries, machinery and pipe lines at any time, or at the expiration of this lease. In case there shall not be found, in any well so drilled, oil, gas, or other substances in paying quantities, then the said parties of the first part to have said well for their own use, and said party of the second part agrees to leave said well in good shape for water; Provided, said first parties pay for the casing therein contained, or furnish new casing of the same quality to the second party.

Party of the first part reserves the right to go upon and visit said land and mines at such times as may be desired to examine and ascertain the amount of product mined or produced thereon.

In consideration of which the said party of the second part hereby agrees and binds his executors, administrators or assigns, or sub-lessees to pay or cause to be paid to the parties of the first part their executors, administrators or assigns, at their office a sum of money equal to five per centum of the market value at the place mined or produced of all oil, gas, asphaltum, lead, zinc and all other minerals or substances whatever, which may be mined or removed by the said party of the second part his executors, administrators, assigns, or sub-lessees, from said lands herein leased and such payment of royalty hall be made on or before the 15th day of each calendar month during the continuance of this lease for all oil, gas, asphaltum, ore, minerals, products and substances above named, mined and removed from the land during the calendar month last preceding such date of payment. Said party of the second part further covenants and agrees to exercise diligence in conducting said prospecting and mining operations, and to drill, bore, prospect, open and operate oil wells, shafts, drifts and mines for the ores, minerals, products and substances above indicated, in a workmanlike manner. And the said party of the second part further covenant and agrees that he will keep an accurate account of said mining operation showing the whole amount of oil, ore, etc., mined or removed, and that the party of the first part

shall the right to make such reasonable examination of the books of account as may be necessary to obtain all information desired as to the amunt of product mined or removed from said land under this lease.

The parties of the second part hereby agree to begin operations on the above described premises within six months after date of this lease, and in case such operations do not begin within said stated time, said second parties agree to pay to said first parties ten cents per acre, yearly, for each and every acre contained in this lease, in lieu of said work. Should said second party fail to comply with the terms of this lease at any time, said first party may give him written notice that unless said terms are complied with within thirty days from date of said notice, that said, lease will be declared forfeited, after which said first party may enter upon and take possession of said premises without further notice.

In witness whereof, the said parties have hereunto set their hands and seals the day and the year first above written.

Leander, J. Fish (Seal)
Joseph P. Fish (Seal)
W. M. Smith (Seal)

(Verification.)

Reply.

Come now the plaintiffs and make a reply to the set-off and counter-claim set forth in the answer herein, and reserve unto themselves and do not waive the provision of rule 31, that any new or affirmative matter

found in the answer be deemed to be denied by the plaintiffs, and show to the court as follows:

That plaintiffs deny the allegations contained in paragraph three of the answer to the effect that the said mining lease was made and executed and placed in escrow as set forth, until such time after the said Dallas Hopper should pay the sum of Sixty-five Dollars ($65.00), and sign a note with him as the purchase price of a team of horses, or as more fully alleged in the answer.

Plaintiffs expressly denies that the said lease was left with a Notary Public, or with a banker or with anyone else in escrow subject to the performance of the condition of the contract mentioned in the answer. Plaintiffs deny that the allegations in the answer found at the bottom of page two, and at the top of page three, to the effect that said Hopper, having failed to sign the said note and to pay the Sixty-five Dollars ($65.00), agreed that the said lease should be held in escrow by a Notary Public or placed in the bank to wait the performance of the said alleged agreement by the said Dallas Hopper, because there never was any such agreement.

Plaintiffs deny that he ever agreed to sign any notes with the said Fish, or to pay him any sum of money in addition to that, as set forth in the contract, or mining lease here in question. Plaintiffs deny that the said Hopper surreptitiously took the said lease and placed the same upon the records of Ottawa County, without the knowledge or consent of the said Leander J. Fish.

Plaintiffs deny that the said Leander Fish ever sought the said Hopper for the purpose of obtaining from him the said cancellation of said mining lease, and denies that any cancellation was ever prepared or ever presented to the said Hopper with the request that he sign the same, and denies that he ever agreed to execute any such cancellation or release or disclaimer, but plaintiffs allege the facts to be that the said mining lease was made, executed and delivered as set forth in the petition and not otherwise, and alleges and shows the fact to be that he has in all things performed the conditions and covenants contained in said mining lease, and during the life of the said Leander J. Fish, paid to him when it was due the money provided in said lease in lieu of mining operations.

Plaintiffs further allege and show to the court that no such agreement as a consideration for the said lease claimed in Paragraph Three, Pages Two and Three, of plaintiffs' petition, was ever made and entered into by and between the said Hopper and the said Leander J. Fish, but shows the fact to be that if the said Hopper did make any such agreement as is alleged in defendant's answer, that the said agreement was abrogated and made null and void, and a new agreement entered into by operator of law, in this: That the said Leander J. Fish waived all of said terms and agreements and entered into and accepted the contract as set forth in mining lease made to said Hopper, because after its execution and after the time set forth in the answer, and up to the time of his death in November, 1914, the said Hopper

paid to the said Fish, and the said Fish accepted, the consideration and rentals named and set forth in the said Hopper mining lease, and the defendants are therefore, estopped from claiming any rights under their prior alleged contract.

Making further reply to the allegations contained in defendant's answer, plaintiff admits the execution and recording of the mining leases, defendant's Exhibit "A" and "B" attached to said answer, but shows to the court that the said leases are null and void at this time and were null and void, and were made null and void prior to the pending of this action; that the said mining leases were made, executed and delivered to the said W. M. Smith by the said Leander J. Fish for no consideration whatsoever except as security for a certain debt that the said Leander J. Fish owed to the said W. M. Smith; that it was expressly agreed by and between the said Leander J. Fish and W. M. Smith at the time the said leases were executed, that the same were taken only for the security for the payment of the said debt which the said Leander J. Fish then and there owed to the said W. M. Smith, and that when the said debt should be paid that the said mining leases should be null and void and of no effect, and would be cancelled by the said W. M. Smith; that the said debt, for which the said mining leases were given, has long since been paid and neither the said Leander J. Fish or his estate are now indebted to the said W. M. Smith after any manner whatsoever, and the said debt has been entirely extinguished, and by reason thereof, the said mining leases have been made

null and void ,and plaintiffs ask the court to declare the same null and void and cancelled of record, that the same may not cloud the title of these plaintiffs.

Wherefore, plaintiffs pray judgment as asked for in the petition herein, and for such further equitable relief as to the court may seem just and expedient.

P. A. EWERT,
A. C. TOWNE,
H. L. DAVENPORT,
Plaintiffs' Attorneys."

A reading of the opinion of the Circuit Court of Appeals upon the first trial plainly discloses the fact that all the questions of law involved by the amended bill of complaint were disposed of by the Circuit Court of Appeals. No appeal was taken by the defendant Wesley M. Smith, from the decision of the Circuit Court of Appeals reversing the decree of the lower court sustaining the motion to dismiss in that Court. The defendant filed his answer to plaintiffs' amended bill and went to trial. It plainly appears from the answer of the defendant that the only issues involved in the trial of the case on the second trial were questions of fact.

By the decision of the Circuit Court of Appeals on the first appeal, *McCullough* v. *Smith supra*, only one possible question of mixed law and fact was left open. The mining lease under which the plaintiffs claimed contained a clause as follows (243 Fed., 829):

> "The party of the second part hereby agrees to begin operations on the above-described premises within ninety days after the date of this lease; in

case such operations do not begin within said stated time, said second party agrees to pay to said first party 5c per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate and hold the same."

The Circuit Court of Appeals by its opinion on the first appeal, sustained the validity of that clause, but added (243 Fed. 834):

> "The question whether the clause now under consideration is unfair or inequitable must be determined upon the final hearing upon the issues between the parties. Suffice it to say, it does not appear that there is anything in the clause in question to invalidate the lease. *Guffey* v. *Smith*, 237 U. S. 101, 116, 117."

A reading of defendant's answer discloses that that question was not at issue and there is not a line of evidence adduced on that question at the trial. An attempt was made to raise that question in the Circuit Court of Appeals on the second appeals, but that Court said (*Smith* v. *McCullough*, 285 Fed. 698, l. c. 700):

> "The conclusion is that the defendant failed to prove that the clause under consideration or the lease which contains it was either unfair, unjust, or inequitable."

On the remaining questions of fact the Court in this same opinion says (285 Fed. 701):

> "Counsel object to the decree: (1) On the ground that the 5 cents per acre yearly was not paid but the court below found that it was paid and there was substantial evidence to sustain that find-

> ing; and (2) on the ground that the plaintiffs abandoned the lease, but the court below found that they did not abandon the lease, and there was substantial evidence to sustain that finding. Nor is all the evidence in the record on these questions of fact, when taken together, convincing that any mistake was made by the court below in either of these conclusions. The legal presumption is that the findings and decrees of a court of chancery are right, and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law or some grave mistake has been made in the consideration of the facts. *Tilghman* v. *Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly* v. *Arms*, 129 U. S. 513, 9 Sup. Ct. 355, 32 L. Ed. 764; *Stearns-Roger Mfg. Co.* v. *Brown*, 114 Fed. 939, 943, 52 C. C. A. 559; *Manhattan Life Ins. Co.* v. *Wright*, 126 Fed. 82, 88, 61 C. C. A. 138."

The Circuit Court of Appeals, it is true, permitted counsel to again argue some of the questions of law involved in the suit at the prior trial, but it disposes of these questions in Paragraph 5 of the opinion (page 701) by saying that these questions were argued to the Court and decided adversely to the conclusions of the appellant on the former appeal.

The defendant, Wesley M. Smith, made no attempt to appeal from the first decision of the Circuit Court of Appeals rendered on June 20, 1917. In no place in the entire record as shown by the printed transcript of the record on the second appeal, did the appellant in this Court, Wesley M. Smith, re-raise these questions after any manner or fashion. The only matters at issue at the trial were matters of fact. The appellant Smith

saved no rights and at no time during the course of the trial did he raise any questions of law.

There are no grounds of appeal to this Court found in the record, and the findings of the trial Court and the Circuit Court of Appeal on questions of fact will of course not be disturbed by this Court. A reading of the pleadings, a determination of the issues raised thereby, and a reading of the two opinions of the Circuit Court of Appeals should quickly convince this Court that the appeal should be dismissed.

It further appears from the record that the lands in question are valuable mining lands and the rights of the appellees are being greatly prejudiced by the conduct of the appellant in taking this appeal.

It is respectfully submitted that the appeal should be dismissed.

PAUL A. EWERT, Joplin, Mo.,
A. C. TOWNE, Miami, Okla.,
JAMES DAVENPORT, Vinita, Okla.,
W. M. JACKSON, Fort Scott, Kans.,
W. R. KING, Washington, D. C.,
Attorneys for Appellees.

To Arthur Scott Thompson, Esq., Mimia, Oklahoma, Attorney for Appellant:

Please take notice that the foregoing motion to dismiss appeal and brief thereon will be submitted to the Court on Monday, December 10th, 1923, or as soon thereafter as counsel can be heard.

PAUL A. EWERT,
A. C. TOWNE,
JAMES DAVENPORT,
W. M. JACKSON,
W. R. KING,
Attorneys for Appellees.

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No. 22.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

WESLEY M. SMITH, APPELLANT,

VS.

W. P. McCULLOUGH ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT AND BRIEF OF APPELLEES.

A. C. Towne,
Miami, Okla.,
George J. Grayston,
Joplin, Mo.,
Chas. M. Grayston.
Joplin, Mo.,
Joseph C. Stone,
Muskogee, Okla.,
Solicitors for Appellees.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT.

The appellant, in his brief, refers to the parties as plaintiffs and defendants as they appear in the trial court, and we will do the same where it seems preferable.

Appellant was defendant in the Trial Court.

The appellant's statement as to the history of the case and the issues raised and determined by the Circuit Court of Appeals in the two appeals to that court, is substantially correct, but cannot be accepted by us in its entirety.

Plaintiffs, appellees in this court, have heretofore filed in this court a motion to dismiss the appeal, which has not been passed upon, but is still being urged by us.

The lease under which appellant claims was prior to that under which the plaintiffs claim and its validity was upheld by the Circuit Court of Appeals in its first decision, which was upon the bill and the lease which was made a part of the bill.

Leander J. Fish, the allottee, and owner of the land, a Quapaw Indian, executed and delivered to Dallas Hopper, under date of April 29, 1912, a mining lease covering one hundred and twenty acres of land in Ottawa County, described as the East One-half of the Northwest Quarter, and the Southeast Quarter of the Northeast Quarter, of Section Thirty-two, Township Twenty-nine, Range Twenty-three; and the plaintiffs are assignees of the said lease and claim thereunder.

On November 4, 1912, the said allottee made a lease to the defendant herein, Wesley M. Smith, covering the East One-half of the Northwest Quarter, and the West One-half of the Northeast Quarter, which lease conflicts with the prior lease under which plaintiffs claim, as to the Eighty Acre tract first mentioned.

Under date of January 6, 1913, the allottee made a lease to this defendant covering the Southeast Quarter of the Northeast Quarter of said Sec-

tion, which conflicts with the prior lease under which the plaintiffs claim as to that Forty Acre tract; so that the two subsequent leases cover all of the land upon which the prior lease was given and an eighty acre tract, in between, whereon there is no conflict.

The power of the allottee to make such leases is found in the Act of Congress, approved June 7, 1897, (30 Stats. at L., 72), which is set forth in appellant's statement on page 2 of his brief and will be found at various other places in the records and briefs, and in the opinions of the Circuit Court of Appeals.

The lease under which the plaintiffs claim contained a provision, frequently called a perpetual clause, reading as follows:

> "If oil, mineral, or any other substance of value are found in paying quantities in any well drilled or shaft sunk the privilege of operating shall continue so long as oil, minerals, or other substances of value can be produced in paying quantities upon such terms and conditions as parties hereto have herein agreed upon after expiration of this lease."

Motion to dismiss, in the nature of a demurrer, was filed by the defendant and sustained by the Trial Court, it being contended that the allottee being empowered to lease only for ten years the so-called perpetual clause, purporting to contingently extend the term beyond the ten year period,

was void and inseparable and rendered the entire lease unauthorized and void.

The Trial Court had so held in prior cases which had not reached a higher court.

We cannot agree to the statement made by the appellant, on page 4 of his brief, that it was conceded by the plaintiffs that the so-called perpetual clause was inseparable and invalidated the whole lease, if the land was under restriction at the time; but suggest that the actual situation was that the Trial Court had passed upon the question in several prior cases and did not indicate a desire to have that question further argued and the plaintiffs addressed their arguments to other propositions, such as that the execution of a mortgage, prior to the time when the lease was executed, was such an alienation of the land as to result in the removal of restrictions and to place the allottee in the position of a white man having power to make such leases as he might be willing to make, without regard to the Act of 1897 empowering the Quapaw allottee to lease his land for a limited time.

The defendant also contended that the lease under which plaintiffs claim was invalid because it contained a provision that the lessee might pay an agreed annual rental, frequently called "lieu money," and thus defer the obligation to begin and conduct actual mining operations upon the land; it being argued that this provision in the

lease rendered it void upon its face so that the question could be presented upon the motion to dismiss.

These questions did arise upon the face of the bill and were so presented to the Trial Court and to the Circuit Court of Appeals, which held that the so-called perpetual clause was separable and did not render the lease invalid as to the authorized term of ten years; and that the provision as to the payment of rental, in lieu of actual prospecting or mining operations, was not an illegal provision and that neither the character of the provision nor the amount of rental provided to be paid was so unfair or inequitable as to shock the conscience of the Chancellor and result in denial of equitable relief; and that such contention should be presented at the trial upon proper pleading and be supported by evidence of facts affecting the particular transaction.

McCullough v. *Smith*, 243 Fed. 823.

The judgment of the Trial Court dismissing the bill was reversed and the cause was remanded to be tried upon the merits.

The defendant submitted to this decision of the Circuit Court of Appeals, and, upon remand of the case, filed his answer asserting certain extrinsic facts to render void the lease under which the plaintiffs claim, but alleging no facts as to the unfairness or illegality of the said provision

as to the payment of rental in lieu of work and making no other charge of intrinsic illegality of the lease.

In this answer the defendant denied that the Secretary of the Interior had recognized the mortgage which was executed prior to the lease of the plaintiffs, and denied that such mortgage operated as a removal of the restriction upon the land against alienation, so as to permit the Indian to make a lease as a white man could.

(Answer Paragraph II.)

Then defendant denied that the lease under which the plaintiffs claim had been delivered and asserted certain conditions which would have affected the delivery, if true, and also an alleged promise that the lessee would cancel the lease.

(Answer Paragraph III.)

Then the defendant charged that the lease was obtained by fraud and also that the then lessee had abandoned the lease, and that defendant thereafter procured his leases and entered upon the land and expended certain sums of money in its prospecting and development.

(Answer Paragraph IV.)

So, it will be seen that after the adverse rulings of the Circuit Court of Appeals, as to the contentions made by the defendant on his motion to dismiss, that the lease was invalid by reason of its terms and conditions, and being required to go

to trial upon the merits, the defendant did not, by his pleadings, renew any of his objections to the lease because of any of its own terms, provisions, or conditions.

Trial was had on the questions of fact presented by the pleadings and the Trial Court found these issues of fact in favor of the plaintiffs, sustaining their lease and quieting their title as against the defendants.

The language of the Trial Court is:

> "I find the issues of fact and also the questions of law in favor of the plaintiffs."

The Circuit Court of Appeals had, on the first appeal, held against the plaintiffs on the proposition that the execution of a mortgage by the allottee, prior to the execution of the lease, was such an alienation of the land as to permanently free it from the restriction imposed by the Act of March 2, 1895, and the Trial Court thereafter treated that question as being out of the case.

The case was tried on the merits, before Honorable Robert L. Williams, District Judge for the Eastern District of Oklahoma.

Defendant appealed from the findings of the Trial Court against him as above set out, and it appears from the opinion of the Circuit Court of Appeals that the question as to the perpetual clause was not again presented to that court and that the only provisions in the lease itself attacked

were the recital of One dollar consideration and the said lieu money provision. As to these, the Circuit Court of Appeals referred to its prior decision upon the same questions and expressed the conviction that its prior conclusions were correct and so held, calling attention in particular to the fact that while that court had upon the prior appeal held that the alleged unfairness of the lease, because of the lieu money provisions, was a question of fact to be determined upon proper pleadings and evidence bearing upon that question. The defendant had not taken advantage of the opportunity that he might have had to so raise such questions, but had left the matter as it was before, merely as it appeared in the lease.

The court also discussed the question as to whether or not the lease by its terms, was a present lease or a lease *in futuro,* such as was held void by this court in *United States* v. *Noble,* 237 U. S. 74, saying that this position was taken and presented in a very elaborate and exhaustive brief and found to be untenable when the case was first brought before that court, and upon a re-consideration of the question the court was convinced that there was no error in its former conclusions. The court also held that even though the plaintiffs may have failed to prove their allegations that they immediately after obtaining their lease entered into possession of the land, such failure was not fatal to their recovery and that the defendant had

not been deceived by any such allegations, nor were the plaintiffs in any way estopped because thereof. The court also found against the defendant, upon his complaint that he should have been permitted, after the testimony had been introduced, to amend his answer so as to aver that the plaintiffs, or some of them, had taken an inconsistent position in a suit in the State Court.

Finally, the court considered and determined the alleged equities of the defendant, by reason of the expenditures made in the prospecting and development of the land, finding and holding that such expenditures had been made in disregard of the rights of the plaintiffs and that the defendant had no right to the property, and could not acquire equities or rights against the recorded owners by boldly taking the land, even with great activity and at great expense.

It is our understanding of the evidence that the greater expenditures made by the defendant and the greater activity shown by the defendant was upon the eighty acre tract lying between the two tracts whereon his leases conflicted with the lease of the plaintiffs, thus devoting the greater part of his time and money to the development of the land whereon his right was not disputed.

For the convenience of this court, we copy the opinion of the Circuit Court of Appeals in full:

Smith v. *McCullough,* 285 Fed., 698.

(On Second Appeal).

Sanborn, Circuit Judge, delivered the opinion of the court.

"The plaintiffs, appellees here, brought a suit in equity against the defendant Smith, here the appellant, and secured a decree against him to the effect that the mineral, oil and gas lease of the 120 acres in controversy from Leander J. Fish, a Quapaw Indian, to Dallas Hopper, of April 29, 1912, which Hopper had assigned to the plaintiffs, was valid; that the mineral oil and gas leases from Leander J. Fish to the defendant of November 4, 1912, and January 6, 1913, were void as against the rights of the plaintiffs and that the defendant be perpetually enjoined from interfering with the plaintiffs' possession and use of the premises. From this decree the defendant has appealed.

The plaintiffs' lease required them to commence operations to prospect for and develop oil, gas, or other minerals within ninety days after its date, and defendant's counsel argue that this decree should be reversed because the plaintiffs did not enter upon the land leased within the ninety days. But neither such entry nor the commencement of operations within that time was indispensable to the maintenance of a suit and the recovery of the relief in equity against the defendant claiming under the subsequent leases which the plaintiffs obtained, for the plaintiffs had paid the dollar consideration for the lease and the rental fixed therein, five cents per acre per annum case such operations were deferred. *Guffey* v. *Smith*, 237 U. S. 101, 112, 119 and *McCullough* v. *Smith*, 243 Fed. 823, 825, 833, 834, 835, wherein the pertinent pro-

visions of the plaintiff's lease are set forth and their legal effect was stated, discussed and adjudged by this court. It is true that our decision at that time was based upon the averments of the complaint that the lessee Hopper and the plaintiffs had immediately after the date of the lease entered upon, continued in possession of, and prospected, developed and drilled the land. But under the decision in *Guffey* v. *Smith, supra,* such possession and operation were not necessary to the maintainance of this suit, and the court below found in its decree that the plaintiffs were in possession of the land under their lease at the time of the commencement of this suit.

That lessees' agreement to begin operations within ninety days after the date of the lease is a part of the paragraph of the lease which also provides that in case such operations are not commenced within that time the lessees agree to pay to the lessor five cents per acre yearly for each acre of the land described in the lease 'in lieu of said work.' It is contended that this provision for a postponement of the prospecting, drilling and development of the mineral on this 120 acres for six dollars per year renders the lease so unconscionable that a court of equity ought not to protect or enforce any rights or interests of the lessees thereunder. The arguments, the authorities and the exhaustive brief in support of this position have received studious and deliberate consideration. But the Supreme Court has decided that similar clauses in like leases do not bar lessees from relief in equity from the interference with their rights thereunder by subsequent lessees. *Guffey* v. *Smith,* 237 U. S. 211, 216 and this court held in 1917 that this provision in this lease did

not appear to invalidate it, 243 Fed. 834, cited *Brewster* v. *Lanyon Zinc Comany,* 140 Fed. 801, and added that the question whether or not the clause rendered the lease unfair or inequitable must be determined upon the final hearing upon the issues between the parties. That final hearing has been had and the court below has found that the lease was not inequitable or unfair. There is no averment in the answer of the defendant that this clause or the lease that contained it was unjust or unconscionable, and counsel in his brief calls attention to no evidence to that effect. The issue whether or not the lease was unfair or inequitable must be determined in view of the circumstances at the time it was given. *Guffey* v. *Smith,* 237 U. S. 101, 116; *Willard* v. *Tayloe,* 8 Wall. 557, 570, 571; *Marble Company* v. *Ripley,* 10 Wall. 339, 357; *Franklin* v. *Harrison,* 145 U. S. 459, 473. *Prima facie* the clause and the lease were fair and just. The burden was upon the defendant to prove that they were unconscionable or inequitable. The original parties to the lease had the right to agree and deliberately agreed to the clause in question and to the other terms of the lease, and neither of them sought relief therefrom. The lease and that clause in it were in the customary form of such leases and clauses in the State of Oklahoma and differed from others only in the amount per acre specified for the yearly postponement of the work. This lease was made April 29, 1912. The defendant's leases were made November 4, 1912, and January 6, 1913, and each of them contains a clause whereby the lessee agreed to pay ten cents per acre yearly in lieu of work in case he did not commence operations within the time therein stipulated therefor. When the plain-

tiffs' lease was made in April, 1912, no one had any knowledge of any oil, gas or mineral in or under the land thereby leased. There had been no drilling for or development of such minerals, and there was no drilling for or development in the vicinity of these lands sufficient to make it probable that such minerals would be found until some time in the year 1914. It was not until May 8, 1915, that a discovery of a mine was made on a tract adjacent to the 120 acres here in dispute. None had then been discovered on this land. It is difficult to perceive anything in that state of facts that would indicate that in April 1912, there was any probability that oil or other mineral would ever be found in the land leased, or that the right to prospect for and develop it had or would ever have any substantial value. The discovery of mineral therein was a mere possibility. The probability was that the effect of the lease would be the receipt by the lessor or six dollars per year clear gain and the loss by the lessees of the six dollars per year they paid for this is the natural, and usual result of such leases. Those under which no minerals are discovered are many times as numerous as those under which a valuable discovery is made. And the conclusion is that the defendant failed to prove that the clause under consideration or the lease which contains it was either unfair, unjust or inequitable.

Counsel object to the decree, (1) on the ground that the five cents per acre yearly was not paid but the court below found that it was paid and there was substantial evidence to sustain that finding, and (2) on the ground that the plaintiffs abandoned the lease, but the court below found that they did not abandon the lease and there was substantial

evidence to sustain that finding. Nor is all the evidence in the record on these questions of fact, when taken together, convincing that any mistake was made by the court below in either of these conclusions. The legal presumption is that the findings and decrees of a court of chancery are right and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law or some grave mistake has been made in the consideration of the facts. *Tilghman* v. *Proctor* 125 U. S. 136; *Kimberly* v. *Arms,* 129 U. S. 513; *Stearns-Roger Mfg. Co.* v. *Brown,* 114 Fed. 939, 943; *Manhatton Life Ins. Co.* v. *Wright,* 126 Fed. 82, 88.

Counsel persuasively and exhaustively argue that because of the terms of the plaintiffs' lease the lessees were not required to enter into actual possession of the land until eighty-nine days after its date, and because they did not enter into possession thereof immediately after its date their lease was not a lease in possession and was unauthorized and void under the decision of the Supreme Court denouncing overlapping leases in *United States* v. *Noble,* 237 U. S. 74. This position was taken and presented to this court in a very elaborate and exhaustive brief and found by it to be untenable when this case was here in 1917 and a reconsideration of it in this case has failed to convince that there was any error in that conclusion. This lease, upon its execution and delivery, granted to the lessee a present vested interest in the land described in it, the right to such possession of that land as should be necessarily or reasonably convenient to enable the lessee to prospect for and extract the minerals from the land and the right to

relief in equity against the interference with that right or with exercise thereof by trespassers or those holding inferior rights or interests in the land. *Aggers* v. *Shaffer,* 256 Fed. 648, 649; *Northwestern Oil & Gas Co.* v. *Branine,* 175 Pac. (Okla.) 533, 534; *Righ* v. *Doneghey,* 177 Pac. (Okla.) 86, 88, 89. Counsel has not failed to make other objections to the validity of the plaintiffs' lease, but they are answered in the opinions in the cases to which reference has already been made.

A reversal of the decree is demanded because plaintiffs pleaded in their complaint, and, as the defendant insists, failed to prove that the lessee Hopper immediately on the execution of the lease to him entered into possession of the land leased and that ever since that time he and the plaintiffs have remained in possession thereof prospected and developed the premises and had sunk numerous tests, or drilled holes upon the land. It is insisted that these allegations and the absence of proof of these facts estopped the plaintiffs from any recovery because this pleading was false. But even if the plaintiffs failed to prove the allegations just recited, that fact constitutes no estoppel because the existence of those facts was not indispensable under the terms of the plaintiffs' lease to their recovery, because there is no evidence that those averments deceived the defendant and because there is no evidence that he was led by them to change his situation to his injury.

During the final hearing of this case after the plaintiffs had introduced their evidence and rested and while the defendant was presenting his testimony the defendant, for the purpose of establishing an estoppel of the plaintiffs from maintaining this suit moved to

amend his answer and to plead and prove these facts; that this suit was commenced on July 1, 1916, that on September 29, 1916, the plaintiffs McCullough and Landrum commenced a suit in the District Court of Ottawa County, Oklahoma, against J. E. Pottorff, defendant Smith and others, to recover from them certain shares of royalties that they alleged that Pottorff and Smith by virtue of the leases of Fish to Smith had collected and which Pottorff and Smith had agreed in 1913 to pay to McCullough and Landrum for their advance of certain amounts of money to pay for drilling four holes on a forty acre tract of land included in the leases of Fish to Smith but not included in the lease to Hopper upon which this suit is founded. The court below, upon the objection of the plaintiffs, refused to permit the amendment of the answer, and refused to admit in evidence the proposed proof. Counsel argue that the proof thus offered should have been received because it disclosed a claim of McCullough and Landrum under the leases to Smith so inconsistent with the claim in this suit of the invalidity of those leases as to estop the plaintiffs from maintaining any proceeding to avoid them. But in the suit in the state court McCullough and Landrum claimed that they advanced their money to pay for drilling the four holes in a forty acre tract not included in the lease to Hopper. They claimed that they made the contract with Pottorff and Smith, and advanced the money to pay for drilling the four holes in a forty acre tract not included in the lease to Hopper. They claimed that they made the contract with Pottorff and Smith and advanced the money in 1913, and at that time they had no interest in the lease to Hopper. It was not until the

Spring of 1915 that they procured such an interest, and finally their claim against Pottorff and Smith in the state court was based on the alleged personal agreement of those gentlemen to pay them for the advances they made to pay for the drilling of the four holes, and it did not assert, challenge or involve the validity or invalidity of any of the leases. There was no inconsistency in the collection or the attempt to collect that claim, and the maintenance of this suit to establish the invalidity of the Smith leases as against the prior lease of the 120 acres to Hopper and the court below fell into no error when it denied the motion to admit and rejected the evidence of the suit in the state court.

A forcible and persuasive argument is made to the effect that because the defendant drilled and developed the land in controversy at great expense and extracted lead and other minerals of great value from it his equities are superior to those of the plaintiffs, but he did all this when the plaintiffs had an exclusive valid lease of, and right to secure the minerals in, the land described therein, duly recorded, and the defendant had full legal notice thereof. Parties without right to such property cannot acquire superior equities or rights to it to the rights and equities of recorded owners by boldly taking it with great activity at great expense. The owner has the right to it, and law and equity alike guard and protect that right. The decree below must be affirmed, and it is so ordered."

BRIEF AND ARGUMENT.

I.

Defendant should have raised his objections to the bill and to the lease as a part thereof in his answer. Rule 29 of the Federal Equity Rules after abolishing demurrers and pleas provides:

> "Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer;"

The Circuit Court of Appeals having overruled the motion to dismiss, would have expressly granted leave to the defendant to raise such questions in his answer.

Loughran v. *Quaker City Chocolate & C. Co.,* 281 Fed., 186, 189.

The Circuit Court of Appeals directly suggested that the defendant might raise the question as to the lieu money provision in his answer.

McCullough v. *Smith,* 243 Fed., 823, 834.

(On First Appeal.)

> "(5) We turn now to the second clause in the lease which it is claimed invalidated it. This question does not seem to have been pre-

sented to the court below at all. It was never presented in this court in the original printed brief. It was first suggested in the oral argument at the bar. Were it suggested in this case to reverse the judgment of the court below we should not consider it at all, but it is suggested as a ground upon which the action of the court below should be sustained, and we have concluded that it was best to consider it briefly.

The lease in question expressly recites that it is in consideration of one dollar in hand paid by the lessee to the lessor and other considerations. It has been held not *only* that one dollar is a valuable consideration, but that neither party to such a contract can show that the same was not paid. *Stannard* v. *Aurora E. & C. Ry. Co.*, 220 Ill. 469, 77 N. E. 254; *Lindley* v. *Raydure* (D. C.) 239 Fed. 928, 938.

In *Lovett* v. *Eastern Oil Co.*, 68 W. Va. 70 S. E. 707, Ann. Cas. 1912B, 360, 363, the lease was not only for oil and gas, but for 'the purpose of prospecting, mining, drilling, boring, or digging for oil, gas asphaltum, lead, zinc, coal, and copper, and all and every other kinds of valuable minerals, ore, fossils, or vegetable substances whatever.' The particular clause here in question provides that it shall run 'so long as they (the party of the first part) and their assigns desire to operate or hold the same.' This, we think, means within the period of the lease, which we have held was for ten years. Under the holding just made with reference to the other clause, if it extended beyond ten years it would, in that respect, be void, but the balance of the lease would stand.

We have seen that the petition expressly alleges that the lessee and his assigns, including these plaintiffs, have remained in continuous possession of the said premises; that, under and pursuant to the terms of said lease, they have prospected and developed said land and sunk numerous test or drill holes upon said land, and have sunk a shaft thereon, and improved and developed the same for mining purposes.

It must be borne in mind that the lease was for the purpose of mining lead, zinc, coal, and copper, as well as for the purpose of boring for oil and gas. The rules, therefore, as to oil and gas, which are fugacious (*Priddy* v. *Thompson*, 204 Fed. 955, 123, C. C. A. 277 *Kemmerer* v. *Midland Oil & Drilling Co.*, 229 Fed. 872, 144 C. C. A. 154), do not wholly control the construction of the contract.

The lease gave not only the right to mine for lead, zinc, coal and copper, but it gave the right—

'To use so much of the surface of said land and so much of the building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations, also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture also the right to erect buildings, refineries, machinery, pipe lines upon said premises for successfully carrying on the business of boring, prospecting the object of this indenture, with the right to remove all of said buildings, refineries, machinery and pipe lines, at any time or at the expiration of this lease.'

The rule, therefore, that the lessee who

has the right to oil and gas acquires only an incorporeal hereditament is not applicable to this lease as applied to other subjects of the lease, *Allegheny Oil Co.* v. *Snyder,* 106 Fed. 764, 45 C. C. A. 604; *Lindley* v. *Raydure* (D. C.) 239 Fed. 928.

The question whether the clause now under consideration is unfair or inequitable must be determined upon the final hearing upon the issues between the parties. Suffice it to say, it does not appear that there is anything in the clause in question to invalidate the lease. *Guffey* v. *Smith,* 237 U. S. 101, 116, 117, 35 Sup. Ct. 526, 59 L. Ed. 856; *Brewster* v. *Lanyon Zinc Co.,* 140 Fed. 801, 72 C. C. A. 213.

The cases cited by appellee upon this question are not in point. In *Superior Oil & Gas Co.* v. *Mehlin,* 25 Okl. 809, 108, Pac. 545, 138 Am. St. Redp. 942, the defendant made not a lease but a contract to make a lease to plaintiff of certain lands for oil and gas. The action was to reform and secure specific performance of the lease. The contract sued on was wholly executory. In this case the bill shows the lease in suit was in part executed, and is not a suit for specific performance but is in the nature of an action to quiet title. The holding in that case was that specific performance will not like unless that the agreement is certain, fair, and just in all its parts, and such an action may where showing that the contract is unfair, unjust, and against good conscience, well justify the court in refusing such decree, although the contract, had it been executed, might offer no sufficient grounds for cancellation. It was further held that an executory contract which under its terms leaves

it optional with one party whether or not he will proceed with the contemplated enterprise makes the same likewise optional with the other, and specific performance will not be decreed. It is manifest that case does not sustain the contention of the appellee.

In *Huggins* v. *Daley,* 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320, it is held that where an oil and gas lease provides for the compensation of the lessor solely by a share of the product, and provides for the sinking of a well within a specified time under a penalty as distinguished from liquidated damages, and the lessee makes no attempt to comply with the terms of his contract, and manifests no intention to comply therewith, the lease becomes forfeitable at the expiration of the specified time. In this case the defendant had filed no answer, and did not allege that the lease had been forfeited. This case under the present state of the pleadings has no application.

The same is true of *Reese* v. *Zinn* (C. C.) 103 Fed. 97. It was an action to forfeit a lease upon the ground of abandonment, and did hold that the lease lacked mutuality because it authorized the lessee to terminate the contract at will.

The decree of the District Court is reversed, and the cause is ordered remanded, to the end that the court may overrule the motion to dismiss the petition and permit the defendant, if so advised, to answer and proceed to trial."

II.

The first proposition presented by the appellant in his brief here, is that the so-called perpet-

ual clause in the lease under which the plaintiffs claim, is not separable and that it has the effect of rendering the entire lease void, upon its face.

If appellant has presented any new authority or any argument not twice addressed to the Circuit Court of Appeals, we have overlooked it, because of the limited time that we have in preparing this brief, occasioned by the death of Paul A. Ewert and the necessity of new representation of his interests, or rather of his estate.

In support of the decision of the Circuit Court of Appeals that the said perpetual clause was separable, we will quote the argument of that court and treat the authorities cited therein, in support of its conclusion, as authorities cited by us herein.

McCullough v. *Smith*, 243 Fed. 823, 830.

(On First Appeal).

> "The first question is whether this last provision made the lease in effect in perpetuity and whether it made the lease void from the beginning or valid for ten years and void thereafter.
>
> Turning first and primarily to the Federal authorities upon the subject, in *United States* v. *Bradley*, 10 Peters 341, a suit was brought by the United States on a joint and several bond and it was claimed the bond contained conditions not authorized by statute. The court said, page 360:
>
> 'That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded on il-

legality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period.'

After a review of a number of authorities, English and American, it continued, page 363:

'Upon the whole, upon this point, we are of opinion, that there is no solid distinction, in cases of this sort, between bonds, and other deeds containing conditions, covenants or grants, not *malum in se*, but illegal at the common law, and those containing conditions, covenants or grants, illegal by the express prohibition of statutes. In each case, the bonds or other deeds are void as to such conditions, covenants or grants, which are illegal; and are good as to all others, which are legal and unexceptionable in their purport. The only exception is, when the statute has not confined its prohibitions to the illegal conditions, covenants or grants; but has expressly, or by necessary implication, avoided the whole instrument, to all intents and purposes.'

In *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 222, the Supreme Court said: 'The counsel of the plaintiffs in error have submitted no argument in regard to the two first causes assigned for the demurrer. We have not therefore considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se* is, that the bad parts do not affect the good. The valid may be enforced.'

In *United States* v. *Hodson*, 10 Wall, 395, 408, it is said: 'It is a settled principle of

law that where a bond contains conditions, some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced.'

In *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall, 64, where the Oregon Steam Navigation Co. sold a steamer to one Winsor with a stipulation that she should not be run on the waters of the State of California for the period of ten years from the first day of May, 1867, and this was a reasonable stipulation in restraint of trade for seven years but not for ten, the court held that the contract was separable and that an action would like for liquidated damages for the violation of the contract within the seven years.

In *Burnhisel* v. *Firman*, 22 Wall, 170, where notes had been given in renewal of old notes computing the interest at the rate fixed in the old notes which was in excess of the customary rate and it had been held that such higher rate was valid until the maturity of the notes and that thereafter the customary or statutory rate governed, it was held that in suits upon the renewal notes independently of the bankrupt act and of any statute making such security void *in toto* as usurious they were valid securities for the amount which would be due on a calculation properly made. They were bad only for the excess above proper interest.

In *McCullough* v. *Virginia*, 172 U. S., 102, the Supreme Court, after citing numerous state authorities and the authorities from that court heretofore cited, said:

'We see no reason to change the views heretofore and often expressed by this court, and reiterate, as said in 135 U. S. 668, "This question, therefore, must be considered as

foreclosed, and no longer open for consideration.'' '

Turning now to the decisions of this court, in *Illinois Trust & Savings Bank* v. *City of Arkansas City,* 76 Fed. 271, the city of Arkansas City in the State of Kansas had granted to the Interstate Gas Company the franchise to construct and operate waterworks in the city exclusive in character and stipulated for the payment of specific sums as hydrant rentals. The provision granting the exclusive franchise was void but this court held that the city was liable for the water rentals under the contract.

In *Lincoln Savings Bank & Safe Deposit Co.* v. *Allen,* 82 Fed. 148, 27 C. C. A. 87, this court held that where the plaintiff in error had a claim for $2,700 against one Sears secured by collateral, and it contracted that upon payment to it of $1,500 and the transfer to it absolutely of two of the collateral notes it would release all claims against Sears and surrender the balance of the collateral notes, that while the agreement to release Sears was illegal the contract to surrender the remaining collateral notes was valid and could be enforced. See *Kaufman* v. *Raeder,* 108 Fed. 171, 179, 47 C. C. A. 278, 54 L. R. A. 247.

In *McPhee & McGinnity Co.* v. *Union Pacific R. Co., et al,* 158 Fed. 5, 87, C. C. A. 619, the City of Denver by ordinance has granted to the Union Pacific Railway Company, its successors and assigns, a license to construct a railroad track on Blake Street, in the city of Denver. The city council had no power to grant anything but a revocable license, and it was insisted that every license must be personal and unassignable, and as the license in question ran not only to the rail-

road company, but to its successors and assigns, it was unauthorized and void. This court held that the city council had power to grant this license to the Union Pacific Railroad Company, and if without authority it conferred it upon its successors and assigns the result would be that the latter portion of the grant would fail and the former stand.

In *Jensen* v. *Toltec Ranch Co.*, 178 Fed., 86, 98 C. C. A. 60, it is held that it is no defense to an action upon a contract executed by the promisee that a divisible part of its consideration was without the powers of the promisor corporation if the other part was valuable, legal, and within them; for the promisee may waive the part without the powers of the promisor and recover upon the consideration within its powers.

Passing now from the decisions of the Supreme and of this court to decisions of other federal courts, in *Western Union Telegraph Co.* v. *Kansas Pac. Ky. R. Co.*, (D. C.) 4 Fed. 284, the principle that a provision in a contract which is illegal does not invalidate the entire contract is announced.

In Re T. H. Bunch Co. (D. C.) 180 Fed. 519, the opinion of Trieber, District Judge, quite clearly makes the distinction heretofore pointed out.

In *McBride* v. *Farrington*, 149 Fed. 114, 115, 79 C. C. A. 56, 57, the court said:

'The leases in question are for the mining of coal, iron, petroleum, oil, gas, asphaltum, and other minerals. If void as to the other minerals, they are apparently valid as to the coal. For what length of time they purported to run is not shown by the record. If for an indefinite time the terms of the act would no doubt restrict them to ten years. It is diffi-

cult to see how such leases, which apparently conveyed some rights for a restricted period, can be held to be so utterly valueless as to constitute an entire failure of consideration.'

And in the dissenting opinion it is said:

'It is well settled that when a conveyance or contract contains conditions, some of which are legal and others illegal, and they are severable and separable as respects consideration and performance, the latter may be disregarded and the former enforced.'

The following federal cases sustain the same doctrine: *Van Ness* v. *Hyatt,* 5 Cranch, C. C. 127, 28 Fed. Cas. 1044; *Warner* v. *Howell,* 3 Wash. C. C. 12, 29 Fed. Cas. 257; *United States* v. *Humason* (C. C.) 8 Fed. 71, 79; *United States* v. *Jones* (C. C.) 77 Fed. 717, 721; *Mathews Slate Co.* v. *New Empire Slate Co.,* (C. C.) 122 Fed. 972; In re Johnson (D. C.) 224 Fed. 180, 186; *Northern Pac. R. Co.* v. *United States,* 15 Ct. Cls. 428.

Passing now from the federal cases, a very strong case on the subject, reviewing many cases both English and American is *Osgood* v. *Central Vermont Railroad Co.,* 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930, 933, and see *Shaw* v. *Carpenter,* 54 Vt. 155, 41 Am. Rep. 837.

The following cases quite fully sustain the proposition that the clause in the lease in question was void but did not affect the balance of the lease: *Hart* v. *Hart,* 22 Barb. (N. Y.) 606; *Robertson* v. *Hayes,* 83 Ala. 290, 3 South. 674; *Erie Railway Co.* v. *Union Locomotive & Exp. Co.,* 35 N. J. Law 240; *Glaze* v. *Duson,* 40 La. Ann. 692, 4 South. 861; *Porter* v. *Fisher,* 4 Cal. Unrep. Cas. 324, 34 Pac. 70; *Mack* v. *Jastro,* 126 Cal. 130, 58 Pac. 372; *Hedges* v. *Frink* (Cal.) 163 Pac. 884;

Corcoran v. *Lehigh & Franklin Coal Co.*, 138 Ill., 390, 28 N. E. 759; *Stewart* v. *Pierce*, 116 Iowa, 733, 89 N. W. 234; *Weitzner* v. *Thingstad*, 55 Minn. 244, 56 N. W. 817; *Rosenblatt* v. *Townsley*, 73 Mo. 536; *Morris* v. *Way*, 16 Ohio, 469; *Minnesota Sandstone Co.* v. *Clark*, 35 Wash. 466, 77 Pac. 803.

Other cases in point could be cited, but we have called attention to enough to fully demonstrate, as we think, that the clause in the lease in question was invalid, but it did not serve to invalidate the lease as a whole.

(4) The rule is that when a part of a divisible grant or contract is *ultra vires* or illegal, but not *malum in se*, and the remainder is lawful, the latter may be sustained and enforced unless it appears from a consideration of the whole grant or contract that it would not have been made without the part which is *ultra vires* or illegal. *Illinois Trust & Savings Bank* v. *City of Arkansas City*, 76 Fed. 271, 280, 22 C. C. A. 171, 34 L. R. A. 518; *McPhee* v. *McGinnity Co.* v. *Union Pac. Ry. Co.*, 158 Fed. 5, 19, 87 C. C. A. 619.

This lease is divisible, and it does not appear that it would not have been made without the clause assailed."

III.

The next proposition asserted by the appellant, is that the lease under which plaintiffs claim is not a lease in possession, as defined by the Supreme Court of United States in the case of *United States* v. *Noble* and that it is therefore void.

(Appellant's Brief, Page 47.)

As appellant earnestly insists that the decision of the Supreme Court in *United States* v. *Noble*, 237 U. S. 74, furnishes support for various contentions made by appellant in this case, we will devote some space to discussion of the Noble case at this time, taking the case as it was presented to and decided by the District Court of the United States for the Eastern District of Oklahoma, and following it on through the Circuit Court of Appeals and this court.

DISTRICT COURT.

U. S. v. *Abrams, Noble et al.*, 181 Fed. 847.

This case was decided by Honorable Ralph E. Campbell, Judge of the said district, September 19, 1910.

Charley Quapaw Blackhawk, a Quapaw Indian, was owner of the land. We will number the leases given by the Indian landowner, giving them the same numbers which the Supreme Court gave to them in its opinion, to facilitate reference thereto.

Leases given by the Indian lessor were:

1. Lease June 11, 1902, to Abrams, ten years. Royalty 5 per cent. Gas $40.00 per annum for each well. Minimum of $20.00 per year as to 5 per cent royalty.

Assigned by Abrams to Iowa & Oklahoma Mining Company August 13, 1903.

2. Lease August 24, 1903, to Abrams, ten years. Cash payment of $18.00. Five per cent royalty. Minimum royalty $21.00 per annum.

Contains clause:

> "All leases or parts of leases heretofore made are by mutual consent cancelled, annulled and abrogated."

Abrams assigned this lease to Iowa & Oklahome Mining Company November 2, 1904.

3. Lease March 25, 1905, to L. C. Jones and A. J. Thompson, ten years. Cash bonus $10.00 and 5 per cent royalty. Contained clause:

> "Subject to prior lease executed by said first party January 1st, 1902, unto A. W. Abrams."

Jones assigned his interest to Thompson July 31, 1905.

4. Lease April 4, 1905, to Iowa & Oklahoma Mining Company, ten years. Cash bonus $25.00. Five per cent royalty. $40.00 per annum for each gas well. Minimum royalty $21.00. No reference to any former lease.

5. Lease May 22, 1906, to Iowa & Oklahoma Mining Company, ten years. Cash bonus $25.00. Five per cent royalty. $40.00 per annum for each gas well. Minimum royalty $21.00.

This lease contained provision (copied in opinion p. 850) that it shall not be construed as a waiver or relinquishment of any prior lease held

by the lessee but all leases shall run concurrently and lessee shall have the right to elect as to which of the leases it will operate under.

6. Lease July 28, 1906, to Iowa & Oklahoma Mining Company, twenty years. Cash bonus $21.00. Five per cent royalty $40.00 per annum for each gas well. Minimum royalty of $21.00.

Contains similar provision as that in last mentioned lease of May 22, 1906.

Bill contained allegations of fraud in procuring of leases sought to be cancelled.

Plaintiff conceded validity of first lease—the one to Abrams dated June 11, 1902.

Judge Campbell held: That by reason of the clause in lease No. 2, dated August 24, 1903, from the Indian, Blackhawk, to Abrams, cancelling lease No. 1, the lease No. 2 *would have been valid but for the assignment of lease No.* 1 *to Iowa & Oklahoma Mining Company prior to the making of lease No.* 2.

In other words, the Indian had a right to cancel one lease and make another (Page 853).

Lease No. 3 dated March 25, 1905, was to Jones and Thompson, who did not own either prior lease, so there could be no cancellation of the prior lease or leases, as a matter of law, arising out of the act of giving a later lease.

Judge Campbell held lease No. 3 valid because its term began at its date and ran only ten years from date of its *execution,* and that it was

subject to the prior lease during the unexpired term of that lease. Pages 853-854.

Lease No. 4, dated April 4, 1905, did not expressly cancel former leases then held by this lessee, Iowa & Oklahoma Mining Company, but Judge Campbell held that it had that effect, as a matter of law, and was valid. Page 855.

Lease No. 5, dated May 22 (or 12), 1906, was held invalid because of the provisions *negativing an intention to cancel prior leases.* Page 855.

Lease No. 6 was held invalid because it was for *twenty years.* (Page 855).

Demurrer as to defendants Abrams and Iowa & Oklahoma Mining Company were overruled.

Demurrer as to Thompson was sustained. (Jones had assigned his interest in lease No. 3 to Thompson). Page 855.

August 16, 1902, the Indian assigned royalties provided for in lease No. 1, dated January 11, 1902, to Charles F. Noble. Noble assigned one-half interest in these royalties to John M. Cooper.

A. S. Thompson and V. E. Thompson were employed by the Indian to sue to set aside assignment of royalties to Noble, and were to get one-half of royalties recovered. Suit was instituted in his name.

Judge Campbell held that the Indian did not violate any governmental policy by assigning royalties and that the Government could not sue for

him to set aside such assignments on the grounds of fraud. Page 856.

Demurrers of defendants Noble, Cooper, A. S. Thompson and V. E. Thompson were sustained.

SAME CASE IN CIRCUIT COURT OF APPEALS.

United States v. *Noble, et al.*, 197 Fed. 292.
(*U. S.* v. *Abrams et al.*, below, 181 Fed. 847).

Opinion by Smith, Circuit Judge, May 23, 1912.

The Government appealed from the decision of the District Court, 181 Fed. 847.

Decree of lower court was affirmed by majority of court. Smith, Circuit Judge, and Marshall, District Judge, concurring. Adams, Circuit Judge, dissented.

The reasoning of the majority opinion is substantially an approval of the opinion of the district judge.

In the dissenting opinion Judge Adams pointed out that the express provision in the lease of date August 24, 1903, (No. 2) declaring that "all leases or parts of leases heretofore made are by mutual consent cancelled, annulled and abrogated," had no effect *because the prior lease upon which it would have operated if owned by the lessee in the second lease had been assigned and was not*

then owned by this lessee, who could not, therefore, effectively assent to its cancellation.

Then the dissenting judge, referred to the holding of the court in *Noble* v. *Abrams,* 194 Fed. 82, 114 C. C. A., 160, in which he concurred, to the effect that "*where there had been several mining leases made by the same allottee, and all had been in good faith cancelled by the parties thereto, no obstacle was interposed to the making of another lease for the full period of ten years.*"

Then the dissenting judge said: "That is as far as my judgment permits me to go."

So it will be seen that there is nothing in even this dissenting opinion to weaken the holding in *United States* v. *Abrams, supra,* or the agreement therewith in Judge Campbell's opinion and the opinion of majority of the Circuit Court of Appeals, on appeal of the Noble case.

Now, as pointed out by Judge Campbell and by the Court of Appeals in both the majority and the dissenting opinions, the question of the right of the allottee, to fairly, and in good faith, cancel an existing lease and give a new one for ten years, *was not involved in the Noble case.* Therefore it was not before the Supreme Court on appeal to that court.

SAME CASE IN THE SUPREME COURT.

United States v. *Noble*, 237 U. S. 74.

This further appears from the statement of the court (237 U. S., l. c. 79):

> "It is not important here to consider the disposition made of the leases described in paragraphs (2), (4), (5) and (6), as these are not involved in this appeal..... We have, then, the question of the validity of the lease and assignments described in paragraphs (3), (7) and (8)."

The leases excluded from consideration are the leases which we have numbered herein by corresponding numbers 2, 4, 5, 6, and the only lease left for consideration by the Supreme Court is the one numbered 3, which is the lease dated March 25, 1905, given by the allottee to L. C. Jones and A. J. Thompson, and which contained this recital:

> "Subject to prior lease executed by said first party January 1st, 1902, unto A. W. Abrams."

The decision of the Supreme Court as to the leasing power of the allottee was confined to a holding that lease No. 1, dated January 1st, 1902, being concededly valid, lease No. 3, *by its terms subjected to lease No.* 1, was an overlapping lease, a lease *in futuro,* and void.

The other portion of the opinion dealt with the assignments of royalties holding that they con-

stituted a conveyance of the allottee's reversionary interest.

The lieu money provision does not operate to make the lease in question a lease in Futuro.

The provision in this lease that the lessee may pay an annual rental of a certain amount per acre, regardless of the amount thereof, does not give to the lease the character of a lease *in futuro.*

The rights are granted *in praesenti,* and the lessee is given the alternative of prospecting and mining immediately, or paying the annual rental in lieu thereof. Such a provision was and is not new, and the courts have not indicated difficulty in arriving at a reasonable understanding of such and similar provisions used in actual leases given for mining purposes.

The Circuit Court of Appeals in this case, on the first appeal held that the provision did not on its face impair the lease, and cited in support of this ruling:

> *Guffey* v. *Smith,* 237 U. S., 101, 116, 117; 35 Sup. Ct. 526, 59 L. Ed. 856;
> *Brewster* v. *Lanyon Zinc Company,* 140 Fed., 801, 72 C. C. A. 213, decided by the same court.

In *Guffey* v. *Smith, supra,* decided by this court, it appears that there was a provision in the lease that a well should be drilled within nine months from date, or a rental of 25c per acre per year should be paid for such time as the drilling

of the well was deferred. The lessee also had the right to surrender.

The action was in equity by a prior lessee to enjoin operations under the later lease and for a discovery and accounting.

The Supreme Court of Illinois held that the lease could not be directly or indirectly enforced in a court of equity because of the surrender clause. The Circuit Court of Appeals reached the same conclusion, reversing the United States Circuit Court, 202 Fed., 106.

This court reversed the decision of the Circuit Court of Appeals, remanded the case to the United States District Court, successor to the Circuit Court. This court held that Federal Courts do not follow the State Courts in equity cases but determine for themselves what the general principles of equity are and that an option to surrender or cancel given only to the lessee would not prevent the granting of equitable relief except as to specific performance of executory contracts.

It was contended in that case as it is in this, that the provision for the payment of rental or lieu money was so unfair and inequitable that a court of equity would not afford relief to such lessee, but this court held that whether the lease was unfair and inequitable must be determined in view of the circumstances in which it was given, citing other decisions by this court in support of that proposition and this court said that in de-

termining the fairness of a lease the undeveloped condition of the district should be considered; that the parties were competent to contract and that the consideration of one dollar paid to the lessor and the covenants and agreements of the lessee could not be pronounced unreasonable and that similar leases resting upon a like consideration often have been sustained in cases not distinguishable from that case.

237 U. S. l. c. 114, 115.

In *Brewster* v. *Lanyon Zinc Company, supra,* the other case cited by the Circuit Court of Appeals in support of its conclusion in this case, there was a provision that operations might be deferred by the payment of an annual rental and the parties should be held to their contract and if the land owner desired immediate exploration he should so provide in the contract.

The two cases above discussed do not involve Indian leases, but they were cited by the Circuit Court of Appeals in this Indian case as being applicable and inasmuch as Congress has authorized the Indian to make a lease upon his own terms and conditions except as to the period of duration thereof, there is no legal basis for a differentiation between an Indian and a white man as to the fairness or validity of provisions which have been left by Congress to be determined and fixed by the Indian himself.

The provision by which the obligations of the lessee as to prospecting or mining, as distinguished from his rights, might be deferred by the payment of rental in lieu thereof, does not change the character of the lease as a present grant.

In *Johnston* v. *Corson Gold Mining Co.*, 157 Fed., 145, 84 C. C. A. 593 (Ninth Circuit)

the court considered a lease which contained a provision that if the lessee should be unable to take possession immediately the obligations of the lessee should not become operative until such time as he should be placed in possession and that in such case, the term of the lease should be extended for such time as would compensate for the time so lost.

The court there held that this was a present grant of rights and was an executed, as distinguished from an executory contract.

The manner in which rental is to be paid or the amount thereof does not determine the character of the lease. That is determined by the use of the property which the lessee is permitted to make. It is a limitation upon the rights of the lessee as to the use of the property. The power of the Indian to make a mining lease is not to be determined by his use of the power.

An Indian might make a lease absolutely requiring mining operations but the royalty re-

served might be so small that the resulting benefit would be slight even if mining operations were carried on and ore actually produced and sold. He might make such a lease requiring mining operations and such operations might not result in the production of ore because of the absence thereof, in which case a fixed annual rental would be more beneficial. A lessor may restrain the lessee from making an unauthorized use of the premises, but he cannot compel the lessee to use the premises in the manner authorized by the lease.

Benson v. *Sauris,* (Mo.) 204 S. W., 550.

The first portion of the Act of 1897 provides that "the allottees of land within the limits of Quapaw Agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years for farming or grazing purposes, or ten years for mining or business purposes."

Provision is made later in the Act for the leasing of lands owned by incompetent Indians under the supervision of the Secretary of the Interior. Supervision is confined to the cases where the incompetents are unable to lease their lands with benefit to themselves, and power of the Secretary of the Interior is to be exercised after such incompetency has been made to appear to him.

Appellant argues that this provision as to Indians shown to be incompetent and thus unable

to make a beneficial lease, indicates that those permitted to lease without such supervision, only have power to make *beneficial* leases. As hereinbefore stated, the power should not be confused with the exercise of it. If a competent Indian makes an improvident lease he is in the same position as a white man who does the same thing except that in a proper case wherein the Indian himself, or someone authorized to act for him, should seek to have the lease set aside the fact that the lessor was an Indian might have some bearing upon the question if and only where it should be shown that advantage had been taken of some peculiar propensity of an Indian. Some weakness of this kind would call for the application of the same rules as in the case of other incompetency such as low mentality or other condition impairing the will or reason of the lessor; but to assume that an Indian is incompetent merely because he is an Indian, would be in conflict with the determination by the legislative department that the Indians of the Quapaw Agency generally should be permitted to make leases to suit themselves, limited only as to duration, and would be to assert a guardianship over the Indians which the legislative department of the Government has expressly determined to be unnecessary as to such Indians generally.

The Circuit Court of Appeals for the Eighth Circuit, composed of different members from those sitting in the present case, has held that the lieu money provision in a lease was valid and did not destroy the character of the lease as a present demise. This holding was against the contention that it was a lease *in futuro* made by the same counsel who now represents the appellant herein.

Ewert v. *Robinson, and Robinson* v. *Ewert*, 289 Fed., 740.

The same court, composed of different members from those sitting in the present case, has, in still another case sustained a Quapaw Indian lease containing the lieu money provision as against the same attack.

Robinson v. *Ewert*, 291 Fed., 9.

This point was not discussed in the opinion, and we will add by way of explanation that this opinion was rendered by the same court soon after the rendition of the decision from which the defendant in this case is appealing. The point was urged in the briefs but the decision in this case having been rendered but a short time before and the representation of the parties being by almost the same attorneys as in the other case, the point was probably considered as having been settled in the recent prior decision and was therefore not covered in the opinion.

We call attention to the various decisions on the lieu money provision rendered by this same

court whose decision is now under review, because while it is the same court it has been made up of different judges and the cases show a determination of this question by a greater number of judges than sat in any one case.

We recognize the fact that the court endeavors to be consistent notwithstanding its changing personnel, but still we believe that the fact that a large number of judges have reached the same conclusion, though sitting in the same court, is at least worth mentioning.

We have heretofore called attention to *Guffey* v. *Smith, supra,* wherein a lieu money provision was sustained by this court and remarks which will be found therein show that such provisions are in common use both in mining for oil and gas and for solid minerals, so that it cannot be well said that any strange or unusual provision was inserted in the lease now before the court.

IV.

The third assignment of error is as follows:

> "The court erred in failing to decree that the plaintiffs by their conduct in seeking and claiming an interest in the Smith leases in the State Court proceeding, were estopped to challenge their validity in this cause."

This suit was filed in the United States District Court for the Eastern District of Oklahoma on July 1, 1916. Sometime later on in that same

year, a suit was commenced in the District Court of Ottawa County, Oklahoma by Robinson and others, as the petition will show, among which was McCullough, the plaintiff in this case, and a man by the name of Landrum, who were parties in that suit. As we will later direct to the attention of the court, the testimony will show that this suit did not embrace any of the land in the 120 acres covered by the Hopper lease, so far as the work they actually performed.

The suit inadvertently covered the 200 acres of the allotment, but as a matter of fact, Robinson and his associates only had a lease on the west eighty acres of the Northeast quarter of the section and none of that land embraced the 120 acres. That was an action against some of their associates to make them account to them for the royalties that they could have received had not some of their associates conspired with Smith to let their contract lapse and joined with others in taking a new lease from Smith. That suit had nothing to do with the land in controversy, and nothing to do with any of the plaintiffs in this case who are interested in that land.

McCullough is not the only plaintiff in this case. He was joined in the commencement of the case with Beth and with Phillips, who had interests in it. It developed during the trial that McCullough had parted with his interest down to a certain amount and that some of those interests

had been re-conveyed to him, and that others belong to Paul A. Ewert, A. C. Towne, E. M. Landrum, and Frank Gaines, who were all made parties to the suit in the United States District Court before the judgment was rendered in the case, and that their interests with the McCullough interest include all the interests in the lease. Later on we will call to the attention of the court to testimony showing that fact.

V.

Defendant's assignment Number 4 is as follows:

> "The court erred in not permitting this defendant to file an amendment to his answer charging more in detail the fact of such state court proceeding, after the evidence had been admitted and the plaintiffs herein had admitted that such allegation of proceeding in the state court was correct."

The only argument in support of this assignment is the statement in defendant's brief as follows:

> "The court should have permitted the amendment offered. No one could have been hurt. It had to do with matter unchallenged and admitted. In the opening statement of counsel for defendant it was mentioned as a defense (Record 72). It was a species of estoppel that required no special pleading. It was rather evidence of conduct that causes a denial of relief to the offender by a court of equity."

The Circuit Court of Appeals in dealing with that question in their finding and opinion, said: (285 Fed. 698, 702).

> "During the final hearing of this case after the plaintiffs had introduced their evidence and rested and while defendant was presenting his testimony, the defendant, for the purpose of establishing an estoppel of the plaintiffs from maintaining this suit, moved to amend his answer and to plead and prove these facts: That this suit was commenced on July 1, 1916; that on September 29, 1916, the plaintiffs McCullough and Landrum commenced a suit in the District Court of Ottawa County, Okla., against J. E. Pottorff, defendant Smith and others, to recover from them certain shares of royalties that they alleged that Potterff and Smith by virtue of the leases of Fish to Smith had collected and which Pottorff and Smith had agreed in 1913 to pay to McCullough and Landrum for their advance of certain amounts of money to pay for drilling four holes on a 40 acre tract of land included in the leases of Fish to Smith, but not included in the lease to Hopper, upon which this suit is founded. The court below, upon the objection of the plaintiffs, refused to permit the amendment of the answer, and refused to admit in evidence the proposed proof. Counsel argue that the proof thus offered should have been received, because it disclosed a claim of McCullough and Landrum under the leases to Smith so inconsistent with the claim in this suit of the invalidity of those leases as to estop the plaintiffs from maintaining any proceeding to avoid them. But *in the suit in the state court McCullough*

and Landrum claimed that they advanced their money to pay for drilling the four holes in a 40 acre tract not included in the lease to Hopper. They claimed that they made the contract with Pottorff and Smith and advanced the money in 1913, and at that time they had no interest in the lease to Hopper. It was not until the spring of 1915 that they procured such an interest, and finally their claim against Pottorff and Smith in the state court was based on the alleged personal agreement of those gentlemen to pay them for the advances they made to pay for the drilling of the four holes, and it did not assert, challenge, or involve the validity or invalidity of any of the leases. There was no inconsistency in the collection or the attempt to collect that claim, and the maintenance of this suit to establish the invalidity of the Smith leases as against the prior lease of the 120 acres to Hopper, and the court below fell into no error when it denied the motion to admit and rejected the evidence of the suit in the state court."

To that feature of the court's decision the defendant makes no direct argument and cites no authorities.

VI.

We will pass to the next assignment, Number 5, which is as follows:

"The court erred in finding that the plaintiffs or their assignor had paid five cents per acre annually for the three-year period before they claimed to have taken possession of said land.

The court erred in failing to find that plaintiffs had abandoned their lease by failing for more than three years to perform any of the covenants to prospect and mine under said lease, and by their conduct in buying and selling interests therein for nominal consideration.

The court erred in finding that the plaintiffs have acquired by assignment the mining lease executed by the Quapaw allottee on April 29, 1912, to Dallas Hopper, for the reason that this record does not disclose that these plaintiffs have acquired the whole interest in said lease."

It will be seen from this assignment that at least three distinct propositions are involved and the argument presented by the defendant is directed to part of them, at least. After stating the assignment, he says: "The lieu money was not paid." We contend, and will later show by the testimony of Hopper himself, that the lieu money was paid.

VII.

Defendant's assignment number 6:

"The court erred in its judgment decreeing relief to the plaintiffs and quieting their title against defendant herein, for the reason that the plaintiffs were not in possession of said lands or any part thereof at the time of the institution of the suit or subsequent thereto, and the court as a court of equity did not obtain jurisdiction to quiet title when the plaintiffs were out of possession and the de-

fendant was in possession of the lands involved herein."

This of course is a mere conclusion of fact on the part of defendant. The testimony conclusively shows that the plaintiffs took possession of the land and started sinking shafts and drilling holes, then the defendant Smith, and his sublessees, began their scramble to keep the land from being developed, even resorting to force and actual violence and the procuring of an injunction against the plaintiffs, thereby keeping them from prospecting said land.

If there had been no testimony in support of the allegations of the bill which the defendant characterizes as false pleading, the mere failure of the plaintiffs to support those allegations would not have been sufficient to warrant a court in casting them out. There is not a suggestion that the defendant was misled or in any wise harmed by the failure of the plaintiffs to fully support such allegations.

The Circuit Court of Appeals so held in its last opinion in this case from which the defendant is now appealing.

The same court, composed of different members, has held that where a plaintiff first took the position that his lease given in 1912 was a valid lease, and afterwards changed his mind and stood on a lease given in 1914 and the defendant was not

in any wise injured by this change of position, it was not ground for denying equitable relief, and also held that the plaintiff had a right to assert his claim under both leases, although both could not be valid, because he had a right to have the court determine which lease was valid.

Robinson v. *Ewert*, 291 Fed. 9.

VIII.

Assignment Number 7:

> "The court erred in refusing to deny relief to plaintiffs on account of their false pleading."

is a mere assumption on the part of the defendant and is not borne out by the testimony.

IX.

The eighth assignment is practically a repetition of the other seven, in this:

> "The court erred in finding and adjudging all the issues in the case for the plaintiffs and against this defendant and in granting the relief prayed for, because the evidence does not sustain such finding and judgment and should have been for the defendant."

X.

Defendant's other assignments, from 9 to 15, inclusive, are not argued or presented in his brief.

XI.

In discussing the four assignments, 5 to 8, inclusive, we will first present the testimony on these points and then present them altogether. Such testimony supporting the issues on the part of the plaintiffs is substantially as follows:

PLAINTIFFS' TESTIMONY.

Dallas Hopper, testified (Rec. 73-83) that he had lived in the mining district of Ottawa County and had been engaged in the mining business about 10 years; that he was acquainted with Leander J. Fish during his lifetime and with his allotment; that he had no interest in the controversy and is not a party to the suit and claims no interest under the Fish lease; that he assigned a portion of the Fish lease to McCullough and that plaintiffs' exhibit No. 1 is the lease that he took from Leander J. Fish on April 29th, 1912; and said lease was made, executed and acknowledged in Miami before O. B. Ballard, a Notary Public, and was witnessed by M. Duffy and Mr. Williams; that when the lease was executed it was delivered to him by the notary public in Fish's presence and in the presence of the two witnesses Duffy and Williams; that Williams and Duffy signed it as witnesses and he and Fish signed it as parties and that it was read over to Mr. Fish and he knew its contents; that he paid Mr. Fish lieu money, $7.50

the morning the lease was taken; that the notary handed the lease to him after it was executed; that he and Fish stepped out on the corner and he there paid Fish the sum of $7.50 as lieu money, and they stood there a few minutes then the witness went on down to the recorder's office at the Court House and had said lease recorded; that he afterwards paid Fish lieu money at different times, once in the presence of A. C. Jones at Miami, and at different times to the amount of $20.60; that the last payment of lieu money he made to Fish was along the last of October or first of November, 1914; that on the 5th of May, 1915, he commenced to sink a shaft on the southeast of the northwest quarter and that he sunk the shaft down 34 feet and then put a drill on and then drilled and sunk two other shafts, one about 28 feet, and the other 48 feet and then drilled four holes right near the shafts and then moved the drill over on the northwest corner of the forty; that the drilling was commenced in June, 1915; that he had transferred his interest before that time and was working under a contract from McCullough and that after drilling on the northwest corner a number of holes were drilled along the north side of the 40, as shown by the map of the drill holes which was introduced as exhibit 5. There are 28 holes in all on the southeast of the northwest; that there were three holes drilled on the northwest of the northwest by Adam Scott and McCullough,

and that there are 32 drill holes all told drilled on the lease.

That nobody else had commenced development on this 120 acre lease when he started to work there and nobody had sunk a hole. Objection was made by counsel for defendant Smith that it was incompetent for plaintiff to show development after the suit was filed. The court remarked (Rec. p. 81), "if it was incompetent for plaintiff to show development after the suit was filed it would be incompetent for defendant to do so and the issues in this case will be tried out on the status at the time the suit was begun." Counsel for plaintiff contended that they were in possession when the suit was filed and had done considerable development and had attempted to keep up the development since that time.

Witness Hopper further stated that McCullough and those working for him had expended approximately $8,000 in development; that at the time the suit was filed on July 1, 1916, Walker and McAuley were in possession of said land working under a contract or lease from McCullough; that nobody else was working on the lease at the time the suit was filed; that Walker and McAuley were working under a contract he let them have; that after witness Hopper let Walker and McAuley have his contract they afterwards got another contract from McCullough. This contract was afterwards introduced in evidence. That the contract

that witness turned to Walker was for a sublease from McCullough. This, in substance, was Dallas Hopper's testimony.

W. P. McCullough, testified (Rec. 84-101) in substance as follows; That he was the plaintiff in the suit and was acquainted with Dallas Hopper and with Walker; that Walker had been drilling on the land in controversy for some time; that he made a contract with him which appears to have been done after the suit was filed. That he (McCullough) began work on the southeast of the northwest quarter about May 5, 1915, and a shaft was sunk about 32 or 34 feet and that in June he began drilling and drilled the first hole 140 feet; kept the drilling up until they had drilled all holes; these holes ran from 140 feet to 176 feet; that J. P. McNaughton was associated with McAuley at that time and they were associated together at the time of this drilling and were partners in the contract given Hopper; and the work done by Hopper was done under the contract by McCullough and McNaughton; that McNaughton then had an interest in the lease having acquired same from Hopper; that McAuley then commenced to drill on the northwest quarter of the northwest quarter along about the 10th of June 1916. He then testified as follows (Rec. 89):

"Q. What did they do, go on.

A. They drilled three holes on the ground.

Q. How deep were those holes?

A. Their No. 1 was drilled to a depth of 302 feet.

Mr. Thompson: What time was that?

A. That was from June along to the last part of July or August.

Mr. Thompson: What year?

A. 1916.

The Court: You say this suit was filed in 1916.

Mr. Ewert: First day of July.

The Court: Was any drilling done on this 120 acres of land by anybody else other than those working under you prior to the time this suit was brought?

A. There was not.

Q. Have you now stated all the drilling and all the work that was done on these three forties in controversy up to the filing of this suit, July 1, 1916?

A. Yes, sir.

Q. You heard the testimony of Mr. Hopper?

A. Yes, sir.

Mr. Ewert: That is all for the present.

The Court: Now I will state I am going to exclude all this evidence upon the part of Hopper; I think that the man Hopper may be permitted to swear that he, Hopper, executed the lease and that he filed it for record, that is an independent act of his own, but I will not allow him to testify any transaction he had with the dead man.

Mr. Ewert: To which the plaintiff asks and is allowed an exception.

The Court: Here is a decision by the Supreme Court of Oklahoma and that is binding on this court.
Mr. Ewert: What is the case?
The Court: Bell vs. Mills."

McCullough testified on cross examination that at the time the suit was filed he held all of the interests in the lease except two-fifths of 27/32; that that would have given him a little better than an undivided one-half interest; that at the time the suit was brought he and his associate plaintiffs owned all the interests in the Hopper lease; that McCullough and his assignors took possession of the lease by paying the lieu money from 1912, as provided in the lease, up to the 5th of May, 1915, when they commenced work. That amount he paid Hopper for an individual 1/6 interest was $200.00; that he acquired his first interest in the lease about the 9th day of April, 1915; that within a day or two afterwards he was out on the lease and Hopper was there sinking a shaft; that Hopper had done some mining in shallow mining and on account of the land being a sandstone formation, that the ore was close to the top of the ground and the shafts were sunk with a view to strike that shallow run of ore. that witness was interested in sinking these shafts or having it done; that there was no ore found in the shaft and they then went to drilling about 150 feet South and East of the shaft, sinking the drill hole

down to 140 feet; that they then drilled another hole about 100 feet directly West of the first hole, drilled down to about 130 feet and found nothing but a few shines; that they drilled eight holes in 1915 and found a small quantity of ore in one at about 126 feet and near that hole they commenced a shaft in June, 1916, and sank the shaft down to sixty-three or sixty-four feet and were still sinking the shaft when injunction proceedings were had. That in 1916, prior to the filing of the suit, there were at least five holes drilled that year; that since the suit was filed they had drilled 16 holes.

McCullough further testified on cross examination that the plaintiffs were enjoined from working on any of this land except 40 acres and that the only ore that they found that would justify mining was on the east half of the northwest quarter that they had been enjoined from further working on; that this ore had been discovered in 1916 by Adam Scott, working under him, and that at the time he went on the land there were no operations up to that time, none up to the time that Scott drilled the holes and discovered the ore.

The witness was asked (Rec. p. 99) whether there was any drilling by Smith on what is known as the Montreal tract at the time the plaintiffs started drilling on their 120 acre lease, the Montreal tract being the 40 acres lying between the West 80 acres and the East 40 acres of the plaintiff's lease involved in this suit. Whereupon it

was objected to by counsel for plaintiff that the Montreal forty is not involved in this suit and it is incompetent to show any work done on the Montreal tract. Counsel for Smith contending that they had a lease on the 200 acres and that he was drilling upon this lease and that work on any part of that lease would hold the land involved in the 120 acres in controversy; to which plaintiff objected and objections were allowed. The witness admitted that he saw drilling on the Montreal forty, not involved in this suit and that this was going on on the Montreal forty when plaintiffs commenced drilling in 1915, but that Smith, nor anyone under him, did any drilling on the 120 acre tract involved in this suit, during 1915 or up to the time prior to the bringing of this suit.

McCullough testified on re-direct examination that he had three holes drilled under Mr. Scott on the northeast of the northwest; that prior to that, on the 22nd of June, 1916, he started to sink a shaft and was run off by defendant Smith, who placed a guard there; and that Scott found the ore in this hole about 128 or 130 feet; that it took them a good while to get their drill rigs on the ground by reason of the fact that every time they tried to get a drill rig on the ground they were met by Smith and his associates and were not allowed to move their drill rigs on the ground; that in the last days of August, 1916, the drill man was there ready to go to work under Mr. Scott, and

that defendant Smith and his associate, Mr. Dyke, would not allow the drill men to go upon the ground; that they threatened to blow up their drill rigs and did run them all off.

Witness was asked by the court to go on and state what other development was done and what attempt, if any, was made to sink a shaft where the ore was discovered, and what was the result. whereupon, the witness detailed that in October, 1917, he began the sinking of a shaft where Scott had discovered this ore, and had got down some seven or eight feet, the work being done by Mr. Scott, under him; that he had his machinery and equipment on the ground, had the shaft cribbed up, and that his men who were working there were arrested and taken off the ground, and that the shaft was blown up and burned and all their machinery moved off the ground. That the witness's men who were working on the ground were taken to Miami and placed in jail, and when the time came for trial they were dismissed; that when Mr. Short, who had charge of the work, was arrested and when plaintiff went to town to give bond for Short, he was informed that they had a warrant for him; that they did not resume the work because they were enjoined directly afterwards; that he had on this land in the way of equipment at that time, everything that was necessary to sink a shaft; they had a boiler, engine and everything

on the ground to build a derrick; that this material was moved off the ground and thrown over across the road or section line. This happened in October, 1917. These were the holes that had been drilled by Adam Scott where the ore was found in 1916; that this shaft was started close to these holes, about 30 feet from the middle hole; that this 40 acres is known as the Quebec forty and is immediately west of the Montreal forty. That at the time these holes were drilled the witness knew that neither Smith, nor anyone under him had done any work on that tract, but that at the time he started to sink the shaft there was some drilling being done under this man Plumb, but that as the plaintiff's lease antedated Smith's lease by six months and they had discovered the ore and had been working all the time on other portion of the lease that their possession was first and their work first. That in all the drilling that he had done he did not find any ore except on this northeast of the northwest where he had started in 1917 to sink the shaft. The witness stated that he did not know of any strike on the Montreal forty having been made when he went on there. That he was continually harassed by Smith and his associates and told if he did not get off the lease they would blow up their machinery.

Adam Scott, testified in substance: (Rec. 107-110): That he had been engaged in the mining business for about 21 years; that he drilled three

holes near the east line of the northwest forty of the land in question; that he commenced getting a drill about the middle of July, 1916; that he sent to Aurora, Missouri, and procured a drill; showed the man where to place the drill and he moved in on the place and when he went back the next day the drill was moved off the land to the North side of it; that the driller told him that they had run him off the land and he refused to go back; that witness then procured another drill man and got him to pull in there about a week later, in August, 1916, and he was stopped just before he got on the land; the witness stated that he was present at the time and that the men who stopped the driller from going onto the land were Mr. Smith, Mr. Dyke and Harry Wright; that these men made threats to the driller and he refused to go on the land after being so threatened. In answer to the question: "State if after that you did any drilling," the witness said: (Rec. 108-109):

> "A. Well I got another man and his drill. He was from Kentucky, he moved in there with a new drill and I brought him there and when he was right next to the corner, Mr. Smith, Mr. Dyke, and Harry Wright, his foreman, came down and told the drill man that he mustn't move in if they did they would attach his drill and make him a lot of trouble, and I asked the man if he owed them anything. He said he didn't, never seen them before. I says you are not trying to avoid any debts I don't think they can attach your machine; he said

he would take a chance on it anyway. *Smith told me he hated to use physical force but he guessed he would have to do it.* But this man pulled in and we drill one hole in the northeast corner of the forty west of the Montreal."

The witness Scott further testified that they drilled three holes to about 171 feet and that he found ore there that would justify mining, but under the attitude of Smith and his associates he did not care to go any further with his contract; that he himself made the log of these holes. The witness said (Rec. 110): "Well, if there hadn't been any trouble about it I wouldn't have hesitated to sink a shaft knowing the character of the ground as I do." That he was continually harassed with notices from Smith and threats of being put in jail by the United States marshal and that sort of stuff; that finally he got tired and went and got another lease; that he didn't want to have to fight the mining game and have to fight to get the mine so he didn't do any more.

Witness *C. E. Bidwell* testified in substance (Rec. p. 112): that he lived at Miami, Oklahoma, and was a civil engineer; he identified the map, Plaintiff's Exhibit No. 5, as one that he had made and that it was true and accurate as showing the location of the holes and shafts and outside boundaries.

J. C. Willum, testified in substance (Rec. 113-116): that he was acquainted with Dallas Hopper

and was slightly acquainted with Leander J. Fish during his lifetime and knew where his allotment was located; he identified Exhibit No. 1 as the lease executed by Leander J. Fish to Dallas Hopper on the 29th day of April, 1912, involving the land in this suit; that witness was one of the attesting witnesses to the lease and M. Duffy was the other one; that he and Duffy were the only subscribing witnesses to the lease; that he saw Fish sign the lease and saw Mr. Hopper sign it and saw O. B. Ballard take the acknowledgment of the lease to Hopper in the presence of Fish; that there was no objection made by any of the parties to the lease or to the delivery to Hopper; that there was nothing said about any consideration other than that mentioned in the lease; that upon the delivery of the lease to Hopper, he took it and went out and Fish got up and went out too. That Fish had talked to the witness in March, 1912, and wanted him to take an interest in the lease with Hopper and wanted him to put up some money to prospect and develop the lease; that the lease was read over to Fish in the presence of witness and that Fish signed the said contract.

A. C. Jones, testified in substance (Rec. 118-120): that he was acquainted with Leander J. Fish and with Dallas Hopper and also with Joe Fish, son of Leander J. Fish; that he knew the circumstances of Fish making this lease to Hopper; that Hopper was then working in a pool hall in Miami

that he frequented; that he went into the pool hall and Hopper asked him to stay and look after the place while he and Fish went down to the notary public to draw up a lease on Fish's land to Hopper; that after they went out and went down to Ballard's office, Fish came back in a little while and he asked him where Hopper was, and said: "Fish did you get your lease fixed up?" and Fish said "yes, sir." I asked him where Hopper was and he said Hopper had taken the lease and went to the court house.

That later, some time in May, 1912, Jack Fish (being Leander J. Fish) came in and asked Hopper to pay him some money as rental on his lease, and Hopper said: "I haven't any money right now, Jack." Fish says, "I just want a little." Dallas says, "How much?" and he says, "three dollars." And Hopper gave him this money and he said: "Jack, I have over-paid you now." And he (Fish) says "well, I will make it all right with you."

J. P. McNaughton, testified in substance as follows (Rec. 121-122): that he had lived in Miami since 1877 and had known Leander J. Fish since about 1880; that he was acquainted with McCullough; that he and his son bought 2/3 interest in this Fish-Hopper lease in April, 1915, and that they paid $250.00 apiece for the interest; that there was no development on this 120 acres of land up to that time; that the first development was done in May, 1915; that about that time Mr. Hop-

per commenced a shaft on the southeast of the northeast of 32, and following that he done some drilling, that some time in June, 1916, just before the suit was brought witness transferred his and his son's interest in the lease to McCullough; that at the time the suit was brought Mr. McCullough and his associates were drilling and sinking a shaft on the land; the witness testified that he had a conversation with Fish a short time after the lease was made and Fish said that he had leased his land to Dallas Hopper.

J. C. Briggs testified (Rec. 128-129) in substance: that he was county clerk and was working in the clerk's office in 1915; that he was acquainted with W. P. McCullough and Dallas Hopper and had known Leander J. Fish during his lifetime and was familiar with the land here in controversy; that he acquired an interest in the lease about the 10th or 15th of April, 1915 and knew about the development work on the land; that the development was commenced about the 10th or 15th of April, 1915; that when the suit was filed witness had assigned his interest in the lease to Mr. McCullough.

That about the time he purchased the interest on April 15th, 1915, witness went out to the land and spent a couple of hours going all over it and he found no development whatever on the 120 acres in controversy; that he only kept his interest in

the lease for a short time and then assigned it to McCullough.

Thomas H. Williams testified in substance as follows (Rec. 130-133): that he was acquainted with the Fish land and had a written lease on the east half of the southeast quarter of the northeast quarter, having bought out Sturgeon and Sheets in September, 1917. That he did some work under that lease, and afterwards, on December 20th, he got a lease and under this lease he drilled several holes to approximately 170 feet; that he superintended the drilling of the holes and that he knows what the holes show and none of the holes drilled showed any ore to amount to anything; that he did not discover any ore to justify the sinking of a shaft or building a mill; that he had a contract whereby he had bought a mill to put on this land in case he found ore; that he started to drill about the 18th of January, 1918, and that the last hole he drilled was about the latter part of June, 1918; that since and up to about the date of his testimony or twenty days before that he had been sinking a shaft; that he thought he had to do some work to keep his lease in force, and when the suit was settled and they had title to it he intended to go back and do the necessary development and test out the entire twenty acres.

William Luther, testified in substance as follows (Rec. 135-136): that he lived at Douthat, which is the mining town located just across the

street from the Fish land; that he knew Smith and Hopper and that at one time he was in the employ of Smith to guard this Fish land that is involved in this suit; that his instructions from Smith were that if Dallas Hopper came down there to tell him to stay off. That Hopper came down there with some tools, Smith was present at the time and told him to tell Hopper to stay off; we told him Hopper was starting a shaft; Smith talked about using force; looked like he would have to; Smith had a hammer handle or pick handle when he came down there and gave it to me. Hopper sunk a shaft five or six feet deep and Smith instructed me to fill it up and I did; filled it up before Hopper came back.

J. A. Wilson, testified in substance as follows (Rec. 138-145): that he resides at the little mining town of St. Louis, Oklahoma; is a miner and familiar with the Fish land in controversy, west of the Montreal Mine and known as the Quebec; that he was employed in October, 1917, to do some work on said land under the direction of Short and McCullough; that he had done work on said land, starting a shaft and on October 10, 1917, they had worked until noon and went back to work when Plumb and Wilkins came down, being lessees under Smith, on this particular 40 acres (this is admitted by defendant). That Plumb and Wilkins wanted to know what they were doing and were informed

that they were sinking a shaft and witness was informed by Plumb and Wilkins that they were getting in bad and they ordered them to stop, but they did not stop and they went away and then came back and again ordered them to stop; then Plumb and Wilkins went over to a couple of drills and came back and again ordered them to stop and they didn't do it; and they said as soon as those boys leave, fill up the shaft; that they then got a little fellow called Shorty to fill the shaft up; these drill boys from the other drills and Plumb and Wilkins all came back together; that witness worked about three days more on the shaft and then Wilkins and Plumb came back again and said: "You are still with us." Witness said: "Yes, I believe we are going to stay." That then they never said any more that day, but on Monday they came back and served a notice to vacate, which is introduced as plaintiff's Exhibit No. 9; that Mr. Plumb and Mr. Wilkins had this constable, Mr. Perry, with them, and he served the notice to vacate; that this occurred about eleven o'clock in the morning; that they then left; that witness and Swinehart, the man who was working with him, sat around the tent and didn't do anything for a while; that he then went to town and while he was gone Wilkins and Plumb came back and as the witness returned from town he met them and they said they didn't want to cause them any trouble and advised witness to leave; that Wilkins and

Plumb then left, and the next thing Mr. Perry, the constable, came and said he had a warrant for the witness and asked him how he would like to go to Miami; that they went to the office of the justice of the peace in Douthat and there saw Wilkins and Mr. Plumb sitting in their car and when witness and the constable drove up they left; that they went in and made bond and were turned loose; witness made the remark that he would have to hurry and go back and get to work and he started back down to work and he could see the place where they had started the shaft and he saw the shaft burning and their stuff laid out in the road; that Plumb and Wilkins' car was down there and they were back a little ways from the burning shaft, coming to the car; the shaft was about nine feet deep from the top where they had cribbed or timbered it, to the bottom; that he saw a can setting on the side of Plumb and Wilkins' car when they left the justice's office; that the other two boys who were working with him they took to Miami. That evening, after the shaft was burned, they went back to their tent and found it laying in the road. After the case against them had been dismissed and they had been discharged, which was some four or five days after their arrest, they went back to the shaft, found the cribbing burned up and the shaft burned up and their equipment, boiler, hoister and engine and that they went to cleaning out and commenced work again and had been working but a short time

when the sheriff came with a warrant for Mr. Short; that McCullough was there and the sheriff told him he had a warrant for him too; that witness and his co-worker, Swinehart, went down to Miami to give bond for Short to get him out of jail. Counsel for defendant stated in court that the information under which they were arrested was signed by Mr. Plumb, the lessee of Smith.

The witness testified that the officers did not catch him to serve the warrant on him and that he skipped out and went to Joplin, Missouri; that plaintiff got out a temporary injunction and then the witness went back and cleaned the shaft out and started to work.

V. Swinehart (Rec. 147-149) testified to substantially the same facts as testified to by J. C. Wilson, as he was the man who was helping Wilson sink the shaft when they were arrested on the complaint of Mr. Plumb.

Jesse Short, testified in substance as follows (Rec. 149-150-152): that he was a mine operator and had been in the mining district around Joplin for 55 years; that he knew the Fish land west of the Montreal mill; that he worked on this tract in the fall of 1917, attempting to sink a shaft under Mr. McCullough's instruction; that he furnished the equipment to sink this shaft; that he had on the ground timbers to build a derrick, boiler, hoister, and blowers and supplies necessary to put a

shaft down and that he had the means and money to sink the shaft and erect the mill and that he already had a mill to put on the ground to complete the work; that Swinehart and Wilson were to sink the shaft, and that he (witness) had a contract with McCullough; that prior to the time witness went on there he had knowledge of what is known as the Scott drilling that was done the year before.

Henry Payne Hopper, testified in substance as follows (Rec. 154-156): That he is the son of Dallas Hopper and now resides at Douthat, Oklahoma, on this lease and had lived there about three years; that he had just recently returned from France where he had been in the service; that he was acquainted with Leander J. Fish during his lifetime; that during the year 1914 witness was residing at Miami, Oklahoma, with his father, Dallas Hopper, and during that year he saw Leander J. Fish quite frequently at his father's house in Miami; that in the fall of 1914, along about the last of September or first of October of that year he heard a conversation between his father and Fish; that Jack Fish came to their house and wanted $10.00 rental money on the mining lease; that Mr. Hopper told him he had already paid him up; Fish said "he wanted ten dollars to get some clothes and wanted to apply it as his rent money on his mining lease; and my father told him he had already had him paid up in advance until 1916

some time, but he let him have ten dollars'' and told him he would not let him have any more before it was due. The witness said that Fish then came to his father's house in Miami for the purpose of getting their horse and buggy to drive out to his place; that his father always let him have it times before that and after that; that in 1914 Fish had got the horse and buggy three or four times.

O. B. Ballard, testified in substance (Rec. 158-160): That he now resided at Eureka, California; that he was the notary public who drew up the lease and took the acknowledgment of Fish and Hopper to the same, and said lease, plaintiff's Exhibit No. 1, was identified by the witness as the lease from Fish to Hopper, and identified the acknowledgment and his signature and his seal and testified that it was executed on the date it bears, the 29th day of April, 1912. Witness testified that he acknowledged the lease; that Mr. Hopper, Mr. Fish, Mr. Willum and Mr. Duffy were present at the time the lease was signed and acknowledged; that at the time the lease was executed, Fish signed it in his presence; Hopper signed it in his presence and the two witnesses, Duffy and Willum signed it as witnesses; that he was the notary public whose name appears on the lease, O. B. Ballard; that Fish and Hopper appeared before him for the purpose of acknowledging the lease and he drew the lease and knew that they signed it for

the purpose therein stated; that he saw them sign it and saw them acknowledge it for the purpose therein stated; that he turned the lease over to Hopper immediately on its execution, in Mr. Fish's presence and they both went out of the place together, Hopper having the lease; that there was nothing said about the lease being made on any condition or anything like that other than as were expressed in the lease. That when Fish and Hopper came into his office Hopper told him that they wanted to make a lease; that he wanted to make a lease with Mr. Fish and for him to acknowledge it and that after the lease was made and executed they left the office together; Mr. Hopper took possession of the lease when they went out; that he heard no conversation about a team or any note.

XII.

Defendant in his brief (pp. 80-81) sets up the fact that the assignment of a two-thirds interest in the lease from Hopper to J. P. McNaughton and his son recites a consideration of One Dollar, this as he contends, proved that the plaintiffs thought and believed that their lease was worthless. As a matter of fact, while the assignment does recite a consideration of One Dollar, yet the facts are, as testified by J. P. McNaughton (Rec. 124-125) as follows:

"Q. Mr. McNaughton, isn't it a fact you and Ray, your son acquired this lease, two thirds interest, for $5.00?

A. $5.00?

Q. Yes.

A. *I remember very well that Ray paid him* $250.00; *I paid him* 200, which was all I had at the time *and paid him* 50 after.

Q. You are quite sure of that?

A. Yes, sir.

Q. What became of your interest?

A. I sold my interest to Mr. McCullough and Ray also.

Q. That was just before the suit was brought?

A. Yes, sir.

Q. What did you get for it?

A. *I realized about* $5,000, *Ray and I together.*"

This testimony was undisputed. We think this is conclusive evidence of the fact that the plaintiffs at the time of the suit considered their lease valuable, and that it was not being "given away" as is claimed by the defendant.

It will be gathered from the testimony that Hopper transferred his interest in the lease to different parties, and that in 1914 McCullough took an assignment from Hopper of a 1-6 interest in it; that McCullough afterwards bought the interests of the two McNaughtons and gathered up the balance of the interests in the lease except what was held by Mr. Phillips and Mr. Beth, who had

taken their interest from Hopper; that McCullough after the suit was brought, assigned a 2/5 interest in it to his counsel, Paul A. Ewert and A. C. Towne; that McCullough was sick and the doctors advised him that he did not have long to live and he assigned considerable of his interest to his wife while he was sick. The assignments are of record and the court's attention is called to the assignments. It is a further fact that all of these interests were assigned back to him before the trial, except the interests of Paul A. Ewert, A. C. Towne, Theresa McClelland, B. E. Beth, Frank Gaines and E. M. Landrum, and they were all made parties to the suit (Rec. 53) so that at the time of the judgment all of the parties who owned any interest in the lease were parties to the suit and at the time of the filing of the suit the plaintiffs, McCullough, Beth and Phillips owned the lease.

The testimony further shows that in 1915 work was commenced on the land in the way of starting the sinking of a shaft, and along in June or July of that year considerable drilling was done, and then the scramble was commenced by Smith and his sublessees to keep the plaintiffs or anyone under them from developing this land; and it appears from the testimony of Adam Scott, J. C. Wilson, V. Swinehart, Jess Short, and others, that Smith and his sublessees resorted to all the force and threats they could to keep the land from be-

ing developed, without using actual personal violence. Adam Scott testified that he drilled three holes on the North forty of the West eighty and found a very large discovery of ore bearing ground, which in his experience as a miner led him to believe that it was worth sinking a shaft on, but he concluded that he could not afford to fight for the possession and then have a law suit on his hands and a fight to build a mill.

Then the witness Short took hold of the proposition and he undertook to go onto this North forty of the West Eighty where Scott had found the ore, and sink a shaft and put a mill on the land and mine it out, but that Smith and his sublessees and their employees, threatened and intimidated the drill men and finally had Short's men arrested so that they could get them away from the shaft while they burned the cribbing and destroyed and took their machinery and hauled it off the premises; took their tent and camping equipment and threw them out in the road, and used all of the strong threats that they could to keep Short from developing the land, so that Short had much difficulty in getting men who would stay on here and work; that when Short went to go back to work Smith procured an injunction against the plaintiffs, or anyone under them, from going onto this north forty of the west eighty acres, and that injunction held up to the time of the trial some four years after this suit was filed. The suit

was filed in July, 1916, and the trial was ended in 1920, and Smith and his lessees during that four years developed the land and took out approximately $500,000.00 worth of ore and kept the plaintiffs out of possession.

On the other forty acres the SE¼ of the NE ¼, the plaintiffs were never able to find any ore in paying quantities up to the time their lease expired; the men who had drilled and made a contract to put a mill on that forty became discouraged because of the law suit and because of the actions of Smith and his sublessees, so that they finally gave up the fight.

XIII.

The Lieu Money Was Paid.

The defendant contends that the lieu money was not paid. Hopper's testimony shows that he paid the lieu money and the testimony of A. C. Jones shows that he saw Hopper pay Fish $3.00 in the month of May, 1912, following the making of the lease, and that at that time Hopper told Fish that he didn't owe him anything and that he was paid up; Hopper testified that he paid Fish $7.50 as lieu money at the time the lease was executed. Henry Payne Hopper testified that in the fall of 1914 Fish again wanted money from Dallas Hopper and Hopper told him that he had him paid up to 1916, but he let him have $10.00. Henry Payne

Hopper's testimony in that respect is as follows (Rec. 155):

> "A. Fish wanted ten dollars to get some clothes and wanted to apply it as his rent money on his mining lease; and my father told him he already had him paid up in advance until 1916 some time, but he let him have ten dollars.
>
> The Court: How much?
>
> A. Ten dollars, and he told Jack Fish that he wasn't going to let him have any more money until he was due money."

Young Hopper fixed the date of this conversation as along about the last of September or first of October, 1914.

It will be observed both from the above conversation and from the conversation had between Fish and Hopper that in the presence of the witness Jones, in regard to these payments, that Fish by his silence accepted the statement of Hopper that he had been paid this lieu money and that at that time there was no money due him. That is undisputed. Then the plaintiffs commenced to work on this land in May 5th, 1915, before any further lieu money was due.

Let us take the dates: The lease to Hopper from Fish was made April 29, 1912; Hopper had ninety days within which to commence any work, then if he did not commence work he was to pay at the rate of 5c per acre per year for each acre

of the lease; therefore, no lieu money was due until the 29th day of July, 1912, but on the date of the lease Hopper paid Fish the sum of $7.50 as rental or lieu money for the first year. Hopper was not in default on anything. On November 6, 1912, when Fish made a lease to Smith covering 80 acres of the land leased to Hopper, and on January 6, 1913, when Fish made a lease to Smith, Hopper was not in default in any way on the payment of the lieu money, for that was only eight months and eight days after the lease was made to Hopper, so that at the time the Smith leases were made Hopper had neither abandoned the land and there was no cause for having it forfeited against him, because he had more than paid the lieu money for the first year and was not in default in any respect. This fact cannot be disputed, and it must determine the validity of these Smith leases or their invalidity; they were lap-leases and they were void because at the time they were taken the Hopper lease was a valid lease upon the 120 acres of said land; he had complied with the terms of his lease and it was binding upon his lessor.

The court has held that the only one who can question the payment or non-payment of lieu money is one of the parties to the lease. That decision has been cited in this case and the court has followed it and counsel for defendant has never challenged that doctrine. That case is

XIV.

A court of equity is appealed to by the defendant to declare an abandonment of the Hopper lease. The plaintiffs in good faith made every effort to prospect and mine their lease, yet because of the illegal, unlawful and violent acts and threats made by the defendant and by injunction the plaintiffs were dispossessed and kept out of possession of said lands. Had Smith not interfered with Short, Short says that he had the money and he had a mill to put on the land and mine it and that he intended to do so; and plaintiffs would have received the five hundred thousand dollars worth of ore that was taken from that land, had it not been for the violent and illegal acts of Smith and his sublessees, and still they ask this court, in all seriousness, to hold and declare the gaining of possession of the land by defendant in that manner an abandonment by the first lessees.

At the time the case was tried in the District Court, nothwithstanding all the harassing and all the ingenuity resorted to by Smith and his sublessees and agents and employees to keep plaintiffs from developing the land, McCullough and his lessees had spent eight thousand dollars in drilling and sinking shafts on the land and had sunk 32 holes to the lower level.

The defendant sought to show all of the de-

velopment that they had made on the west eighty of the northeast quarter—land not included in the Hopper lease—to show their good faith in maintaining their own lease. How that would mitigate against Hopper or how it would help Smith any in proving an abandonment of the Hopper lease, we cannot imagine. The court remarked to them that it looked to him like it would be against them in proving an abandonment by Hopper, by their continued efforts to keep Hopper off the land. In other words, the defendant sought to create a condition to prevent the plaintiffs from mining and developing their lease and then claimed the benefit of an abandonment by the plaintiffs, and the very reason, if any, that the land was not developed and mined by the plaintiffs, was that the defendant himself had created. It looks as though this long law suit has been more of a contest of endurance rather than a legal battle on the part of defendant so that he might keep these plaintiffs out of the ores that were taken from that land. There is no merit in the defendant's contention that the plaintiffs had abandoned their lease.

The record discloses that defendant sets up a false and untruthful statement that the lease of Fish to Hopper had been made and placed in escrow to await the payment of a certain bonus. That was conclusively shown to be false, and they abandoned that. Plaintiffs brought from the state

of California the man who took the acknowledgment of the lease, put him on the witness stand and he testified that he drew the lease according to the instructions of Fish and Hopper, read it over to them, and that they signed and acknowledged and witnessed it and there was never a word said about a bonus of any kind; the lease was delivered to Hopper by the notary in Fish's presence and they left the notary's office and Hopper filed and had the lease recorded and Fish knew that he was doing it. After that testimony defendant abandoned that defense, then he sought this doctrine of a so-called abandonment of a part of the land to be considered and mitigated against the plaintiffs.

There is a great deal of effort set forth by counsel for defendant as to what he terms clean hands in a court of equity. The old saying that "you had better look for the mote in your own eye" is as applicable as it ever was to that sort of a statement. In 1915, when no lieu money was due, the plaintiffs sought to develop this land and then Smith commenced his fight to keep the plaintiffs off the land; he destroyed their property and machinery, intimidated their men and kept them from working, burned their shaft and cribbing and hauled their machinery and equipment off the land, and finally resorted to arrest and injunction, and yet in the face of all this they talk about clean

hands and about abandonment and possession by the plaintiffs.

The District court, under a misapprehension of the law, excluded that portion of Hopper's testimony which related to any conversation he had with Fish as to the lieu money and work done, but as to the making and recording of the lease, etc., it was not excluded.

The court referred to the case of *Bell* v. *Mills,* 158 Pac., 1173, as holding that where the action was brought by the administrator or executor or the heirs at law that the party interested in such suit could not testify as to any communication he had had with the deceased person. We contend that the evidence of Hopper as to the payments made Fish is competent, as Hopper was not a party to the suit (he so testified), and in considering this we must keep in mind McCullough and his co-plaintiffs did not derive their title from Hopper solely. The most of their title came from others who had received title from Hopper and particularly was it competent, because under Sec. 5049, of the Statute of Oklahoma, Hopper was not a disqualified person, as he did not come within the class of persons disqualified by that statute.

Said section is as follows:

> "No party to a civil action shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person,

> when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person, where such party has acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of such person concerning any transaction or communication had personally by such assignor with a deceased person in any such case."

The court was under a misapprehension as to what persons were disqualified by this statute from testifying as to a communication or transaction with a deceased person. This Oklahoma law was copied from Kansas, but since it was adopted since statehood in Oklahoma, the Kansas law has been amended so that the decision of the Kansas court on the amended statute is not applicable, but the decisions of Kansas on the statute before it was amended are applicable.

In construing the Kansas law as it was when enacted in the laws of the State of Oklahoma, the Supreme Court of Kansas in *Thayer* v. *Pernell,* says: "The plaintiff in error, that is, the party in interest, the party adverse to Fred Pernell is not the executor, administrator, heir at law, next of kin, surviving partner, or assignee of Eliza Chrisman, deceased, and does not derive her title immediately from such deceased person." Therefore the testimony of Pernell was not objectionable on account of the provision of Sec. 322 of the

provision of Sec. 322 of the Civil Code, that being the Kansas Code from which the Oklahoma law was taken.

Thayer v. *Pernell,* 71 Kan., 879, 81 Pac. 1134.

Reville v. *Dubach,* 60 Kan., 572, 57 Pac. 522.

Phinnie v. *Atkinson,* 177 Pac. 111, says:

> "Plaintiff was neither executor, administrator, heir at law, next of kin, surviving partner, nor assignee of Farmer. Such persons are not permitted to testify with reference to transactions had with deceased, where they acquired title to the cause of action from the deceased. Neither was plaintiff incompetent to testify under any other of the provisions of said section of statute."

Under the laws of Oklahoma, Section 5049, General Laws of 1910, a class of persons who in specified cases are not competent to testify to any conversation or transaction had with a deceased person.

Alexander v. *Bobier, et al.,* (166 Pac. 716), where it is said:

> "In an action brought by an administrator, the widow and daughter of deceased, neither being a party to the action, are competent witnesses to testify as to transactions and conversations had personally by them with deceased. Such witnesses do not fall within the inhibitions of Section 5049, Revised Laws of 1910; neither are they made incompetent on account of the interest that they might have in the result of the action."

This comes from our own Code. We analyze that section by showing, First, the persons who are disqualified from testifying are persons to the action that have acquired title to the cause of action *immediately* from the deceased person, and then only in actions where certain parties adverse to the party to the suit (be he plaintiff or defendant), are, executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person.

Second, nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case. These are the only limitations and conditions imposed by such section.

The term "any such case" as a limitation applies to such cases in which a witness might be disqualified from testifying as to transactions had with a deceased person. The disqualified person must be a party to the action who acquired title to the cause of action immediately from such deceased person. That means that McCullough could have testified to any communication he had with Fish in this suit, because he did not acquire his cause of action immediately from such deceased, Fish. Hopper, not being a party to the suit, was competent to testify, unless prohibited by the clause "nor shall the assignor of a thing in action be allowed to testify in behalf of such party con-

cerning any transaction or communication had personally by such assignor with a deceased person in any such case." Such case is limited to where the adverse party is one of the class enumerated above.

This suit is against Smith. He is not the executor of the deceased, administrator, heir at law, next of kin, or surviving partner of such deceased person; but they say he is the assignee of such deceased person, and cite *Bell* v. *Mills*, 158 Pac. 1173, as authority on that proposition. An examination of that case discloses that the points decided in that case have no bearing on the question here, remotely, or in any other way. The question decided in this case was that the allottee testifying to the transaction and conversation with her deceased grantee to the effect that a certain deed she had made after her majority was made to ratify a deed she had made to deceased before her majority. Here the question is, can the assignor of a thing in action testify concerning such transaction with a deceased person when his assignee brings action on the thing he signed, in any case, or only when the adverse party is one of those named in the law? We say he is not disqualified in this case because he has a right to testify because he is disqualified only when the adverse party is one of those specifically named in the statute, and he is disqualified only in such cases as named by the law.

The term "assignee of the deceased person" as used in this statute does not mean assignee of the deceased person in just any old thing. It means assignee of the deceased person of the rights the deceased person had in the thing the assignor assigned to the fellow who is bringing the action. In other words, Hopper, the witness, assigned a portion of his lease to McCullough, the lessor Fish owning the other part, and Fish never assigned his rights under that Hopper lease to Smith, so Smith is not the assignee of the dead man or the dead man's interest in the Hopper lease and is not one of the persons in the class of cases that make Hopper an incompetent witness under this statute. Should it be contended that the thing in action is Smith's leases, then Hopper is not the assignor of the thing in action, as he assigned no interest to McCullough of Smith's lease, and therefore is not disqualified to testify, under that statute, and the court below should have considered Hopper's evidence as to the payments made to Fish and his conversations.

In a recent case the Supreme Court of Oklahoma has construed this statute, *Grosshart* v. *McNeal, et al.*.....Oklahoma....., (218) Pac. 329

Supreme Court of Oklahoma, July 24, 1923.

(Syllabus by the Court.)

"1. Witnesses—Rule disqualifying witness to testify in own behalf as to transactions with deceased person not applicable except

where adverse party one of classes specifically named. (In Statute.)

The Court says: Where a statute such as here undertakes to disqualify a person from testifying in his own behalf, disqualification arises only upon the specific conditions named in the Statute itself.

The Court cannot extend the exception embraced in the statute by interpreting therein provisions not found in the Statute itself. *Williams* v. *Campbell*, 84 Kan. 46, 113 Pac. 800. *Burlington* v. *Beard*, 55 Kan. 773, 43 Pac. 320. *Sarbach* v. *Sarbach*, 86 Kan. 894, 122 Pac. 1052. Ann. Cas. 1214. *Hess* v. *Hartwig*, 83 Kan. 592, 112 Pac. 99.

It will be noted that the Statute does not purport to disqualify a person to testify in his own behalf in respect to a transaction or communication had personally by such party with a deceased person. It does so only when the adverse party is the executor, which is not this case, the administrator, which is not this case, heir at law which is not this case, next of kin which is not this case, surviving partner, which is not this case, or assignee of such deceased person, where such party acquired title to the cause of action immediately from such deceased person.

Confusion often results from attempting to place a strange construction upon statutes couched in words the ordinary meaning of which is clear. The word 'immediately' means directly, or without an intermediary. The subject of this litigation was the property which plaintiff owned, unincumbered at the time of the alleged transaction with R. W. Smith deceased. There is nothing in the statute, or in any of the exceptions or limitations thereof, prohibiting this party from testifying

in her own behalf. We conclude therefore that the trial court committed no error in permitting Rachel Lloyd to testify as to her transactions with R. W. Smith. *Sarbach* v. *Sarbach*, 86 Kan. 894, 122 Pac. 1052, and cases there cited; *Williams* v. *Campbell*, 84 Kan. 46, 113 Pac. 800, and cases there cited."

This case sustains our contention that Hopper's evidence of the lieu money payments to Fish was competent and Hopper was not disqualified from so testifying.

An exception was taken to the rejection of that portion of Hopper's testimony, and if the defendant now is to go into the evidence of this payment of the lieu money, then we have the right to urge the consideration of all the legal testimony and if the court goes into it we urge they consider the testimony of Hopper as competent for Hopper was a competent witness.

Williams v. *Campbell, et al.*, 113 Pac., 800.

In that case the plaintiff was suing to recover real estate claimed by her by virtue of being the wife of the decedent, where the defendants are great-grandchildren of deceased, and who acquired their interest in the real estate through the daughter of the decedent, and the court holds that under this statute she is not prohibited from testifying to communications and transactions had personally with the decedent, as the parties adverse to her did not acquire their title to the cause of action immediately from the decedent.

The principal question involved in that appeal arose on the exclusion of plaintiff's testimony. In that case the appellees were not executors, administrators, surviving partners, or assignees of Edwin R. Brown, deceased. It was claimed that they were his heirs, or next of kin; but, if for some purposes the grandchildren and great-grandchildren of his might be so regarded, they are not within any of the classes mentioned in the statute. They are not heirs at law or next of kin who have acquired title to the cause of action immediately from him.

The word "immediately" is defined by Webster as "without intermediary; in direct connection or relation, in a way to concern or affect directly or closely; without the intervention of any person or thing; proximately; directly; closely." Now, the title to the cause of action involved here was not acquired immediately or directly by appellees from Edwin R. Brown, but was derived from or through Mary Brown. It is argued that there is as much reason why appellees should be prohibited from testifying, the same danger of false testimony, as if the adverse party had acquired the lands in dispute directly from Edwin R. Brown. But a party offering himself as a witness is not to be rejected unless the adverse party comes clearly within one of the classes enumerated in the Code. Competency is the rule, and disqualification is the exception. Neither interest in the re-

sult of the litigation nor incompetency operates to disqualify a party except upon the specific conditions named in the statute. The court is not inclined to extend this exception by interpretation.

Bryan v. *Palmer,* 83 Kan., 298, 111 Pac. 443.

Hess v. *Hartwig,* 83 Kan. 582, 112 Pac. 99.

On the contrary, it has been said that "the present judicial tendency is undoubtedly to give a liberal construction to statutes removing disqualifications to testify, and a strict construction to those imposing them—to endeavor to protect the right of parties by requiring evidence from a doubtful source to be given only such weight as the circumstances may seem to justify, rather than by excluding it altogether."

Clifton v. *Mueser,* 79 Kan. 658, 100 Pac. 645.

But it is not necessary to apply a strict rule of interpretation to this statutory restriction. Giving the language of the provision its natural and ordinary meaning, it is clear that appellees cannot be regarded as having acquired title to the cause of action immediately from Edwin R. Brown.

Reville v. *Dubach,* 60 Kan. 572, 57 Pac. 522.

Knights of Pythias v. *Ferrell,* 83 Kan. 491, 112 Pac. 155.

See also *Alexander* v. *Boblin, et al.,* 166 Pac. 716 (Okla.). We further contend, first, that Lean-

der J. Fish, the lessor, and Dallas Hopper, the lessee, being of full age and fully competent to make a contract of this character, had a right to negotiate their own contract on their own terms and for such consideration as they mutually agreed upon. Neither a court of law or equity has any power or authority, in the absence of fraud or mistake, to modify or strike down a contract between such competent persons.

Second. That development is not the sole consideration to this lease and the court has no authority to re-write the lease or change its terms and make development the only consideration.

Third. There being no forfeiture clause in this lease, the lessee had a right to develop or pay the lieu money.

Fourth. That the defendant cannot, in a court of equity, be heard to say that the lease is abandoned by failure to comply with its terms, when by defendant creating conditions that made it hard and slow and impossible at times for the plaintiff to get drillers, and by threats, intimidations and forcing plaintiffs' men to cease work and by violence, force and unfounded arrests of plaintiffs' men, and destruction of plaintiffs' equipment and work, under these conditions, claim, in a court of equity abandonment.

In support of our contention that this was a valid, subsisting lease at the time Smith took his lease on this 120 acres of land and is now a valid

and subsisting lease under the holdings and decisions of the Supreme Court of Oklahoma, and the Smith lease is void and was void when executed, under the holdings of the decisions of the Supreme Court of the United States, we call the court's attention to the following cases:

In *Rich* v. *Doneghay, et al.*, 177 Pac. 86 (Okla.):

> "The grant was for a term of five years from date and as long thereafter as oil or gas, or either of them, was produced by said party. The instrument recited a consideration of $1, paid by the lessee to the lessors. The lessee agreed to deliver the lessors, one-eighth of the oil produced and saved from the premises; to pay certain stipulated sum per annum for each gas well, and for gas utilized from each oil well. The lessee further agreed to complete a well on said premises within six months, or pay at the rate of $15 for each additional month such completion was delayed. The instrument contained the further provision that the lessee should have the right at any time, on payment of $1 to the lessors to surrender the lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms should cease and determine. In an action by the owners of the land to cancel the instrument and remove same as a cloud on their title commenced prior to the expiration of the term of five years, it appearing that no well had been commenced, but that the lessee had made timely payments or tender of all sums stipulated to be paid for delay in completing a well, held:

(a) That the consideration recited in the face of the instrument is sufficient to support the grant of the exclusive right to occupy the land and explore the same for oil and gas and to take and remove such as may be found therein for the entire term specified, and also the right of the lessee, on compliance with the conditions expressed, to terminate the same;

(b) That the agreement is not void for want of mutuality;

(c) That, although no well had been commenced on the premises, the lessors had not the option to refuse timely tender of payments for delay in completing a well and terminate the grant, or to compel a surrender thereof;

(d) That the instrument does not create a tenancy at will within the operation of the rule that an estate at the will of one party is equally at the will of the other."

Brown v. *Wilson*, 160 Pac. 94, L. R. A. 1917B, 1184, on the questions herein decided, is overruled.

"Therefore we cannot assume in this case that the $1 was not one of the considerations, or that the parties did not contract in reference thereto, and we have no right to disregard the $1 and treat the instrument as though the covenant to develop or pay in lieu thereof was the sole consideration. If they so desired, the lessors had the right, to dispose of their property, or any interest therein, for $1, and, having acknowledged that they did so, we will not presume that they did not because of the agreement that under certain conditions they were to receive a further and greater consideration during the life of the grant. Nor will we assume that the consideration is in-

adequate. There is no finding to that effect, or of facts or circumstances from which the same can be inferred. Moreover, if it should be assumed that the consideration is inadequate, it would not follow that the lessor was entitled to cancellation. This court had repeatedly held that inadequacy of consideration alone is not sufficient to justify a court of equity in cancelling a deed regularly executed." Citing

Lewis v. *Allen,* 42 Okla. 584, 142 Pac. 384.
Chancler v. *Roe,* 46 Okla. 34, 148, Pac. 1026.
Miller v. *Folsom,* 49 Okla. 74, 149 Pac. 1185.
Henley v. *Davis,* 156 Pac. 337.
Welch v. *Ellis,* 163 Pac. 321.

In *Welch* v. *Ellis,* the rule is stated by the court as follows:

"Ordinarily, an adult person of sound mind may dispose of his real estate in any manner and for any consideration he see fit, and the deed therefor will not be set aside, in the absence of fraud, duress or mistake. Mere inadequacy of price or any other inequality in the bargain does not *per se* constitute a ground to avoid the bargain. Courts of equity as well as courts of law act upon the ground that every person who is not, from his peculiar position or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses, and whether his bargains are wise and discreet or profitable or unprofitable are considerations, not for the courts of justice, but for the party himself to deliberate upon. 1 Story, Equity Jurisprudence, Sec. 244."

"The parties, if competent to contract and willing to contract, were the only proper judges of the motive or consideration operating upon them, and it would be productive of the worst circumstances, if, under pretexts however specious, interests or dispositions subsequently arising could be made to bear upon acts deliberately performed, and which had become the foundation of important rights in others. Mere inadequacy of price, or any other inequality in a bargain, we are told, is not to be understood as constituting *per se* a ground to avoid a bargain in equity, for courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses, and whether his bargains are wise and discreet or otherwise, or profitable or unprofitable, are considerations not for courts of justice, but for the party himself to deliberate upon. Vide Story's Equity, Sec. 244, citing the cases of *Griffiths* v. *Spratley*, 1 Cox, 383; *Copis* v. *Middleton*, 2 Madd. 409, and various other cases."

"Again it is ruled that inadequacy of consideration is not of itself a distinct principle of equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce and it admits of no precise standard. One man, in the disposal of his property, may sell it for less than another would. If courts of equity were to unravel all these transactions, they would throw everything into confusion and set afloat the contracts of mankind. Such a consequence

would of itself be sufficient to show the injustice and impracticability of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief. That language can have but one meaning. Such meaning is not changed or rendered doubtful by the subsequent covenant that the lessee shall during that term complete a well within a specified time or pay for subsequent periods of delay. The subsequent covenants have no bearing on the term of the grant, except in so far as failure to comply therewith may cause a forfeiture thereof, *if the agreement should so provide*. No other construction, without doing violence to the plain meaning of the language employed, can be placed on the writing as a whole, than that the recited consideration of $1 is for the grant for the entire term of five years, and as long thereafter as either oil or gas is produced, and also the right of termination given the lessee upon compliance with the conditions thereto attached.

"We therefore conclude that the grant or so-called 'lease' for the full term expressed is supported by an independent valuable consideration, and is therefore not void for want of mutuality, and *Brown* v. *Wilson, supra*, holding otherwise, is on this point overruled."

In *Eastern Oil Co.* v. *Beatty et al.*, 177 Pac. 104, the court says:

"In an oil and gas lease for a term of ten years, and as long thereafter as oil or gas is produced, providing royalties on the oil and gas to be paid the lessor, and imposing the alternative duty on the lessee of completing a well in ninety days or paying a sum

specified in advance each additional three months such completion is delayed, there is no implied covenant for diligent operation, or operation at all, during the term of ten years, merely because such operations may be conducted successfully and profitably to the parties. The lessor is deemed to have assented to the postponement of operations through the several periods and bound to accept the periodical payments therefor. It is sufficient to say that no covenant to develop that property can be implied in the face of an express stipulation for periodical payments for delay thereof not extending beyond a definite term. Although development on other lands in the vicinity may show the premises to be situated in oil and gas territory and prove the adaptability of their land for successful and profitable mining operations, the lessors have no legal cause for complaint so long as they receive compensation for the delay for which they have contracted, and the operations on neighboring lands do not drain their premises. This court has never held, and, so far as we are aware, neither has any other court, that under such conditions a covenant for diligent operation or operation at all will be implied."

Under these decisions and under the terms of our lease, plaintiffs contend and urge that Smith's leases are and were void when taken, as to this 120 acres in the lease of Fish to Hopper, because they were over-lapping leases and plaintiffs' lease a valid, subsisting lease when they were taken. It is shown in the bill and admitted that Fish was a Quapaw Indian allottee, and this 120 acres in the

Hopper lease was a part of his allotment and was restricted land, and the Hopper lease at the date of the Smith leases, which were ten-year leases, was a valid existing ten-year mining lease and had run only seven months when Smith's lease covering eighty acres of the land in the Hopper lease was taken, and the allottee had not the power to make these ten-year Smith leases, subject to the Hopper lease.

United States v. *Chas. F. Noble, et al.*, 35 S. Ct. 532, 537; 237 U. S. 74.

XV.

Defendant devotes a large portion of his brief to a discussion of bad faith of the plaintiff, McCullough, because he was forced to dispose of certain portions of his lease between the time that he brought the suit and the date of the trial in 1920. The question of good faith is of course not in this law suit, and it cannot be injected. We dislike to be drawn away from the issues of the case, but because of the persistency with which they urge that point, and the point that the plaintiffs at the time of the bringing of the suit did not own all of the title, and because they claim also error on the part of the court permitting all parties in interest to be made parties plaintiff prior to the entering of the judgment and after it appeared from the evidence that there were other interested persons, we append the following:

Where the Hopper Lease Went.

Date 1915	Rec. p.	Interest
Mar. 11,	262 Hopper to J. P. & Ray McNaughton,	2/3 or 24-36
Apr. 9,	247 Hopper to W. P. McCullough,	1/6 or 6-36
Apr. 10,	263 Hopper to J. C. Briggs,	1/12 or 3-36
Apr. 15,	314 Hopper to Briggs & McCullough	2-36
June 4,	315 Hopper to Thos. F. Phillips	1-36
	Making of total of	36-36

How McCullough Acquired His Interest.

From the above, it will be seen that McCullough acquired directly from Dallas Hopper by assignment of April 9, 1915, a 1/6 or 6-36 interest in the lease; that by assignment of April 13, 1915, Briggs and McCullough together acquired a 2-36 interest in the lease, giving McCullough an additional 36th, or 7-36.

Under date of June 9, 1915 (R. 264¾), Ray McNaughton assigned his one-half interest in the 24-36 interest owned by him and his father, to his father (J. P. McNaughton), and thereafter, to-wit: On October 18, 1915, J. P. McNaughton assigned to W. P. McCullough (R. 268) a 1-9 interest, making McCullough own a total of 11-36.

That by assignment dated April 7, 1916 (Rec. 265-266) J. P. McNaughton assigned to McCullough the remaining 5-9 of his whole interest in the lease, amounting to 20-36. This gave McCullough a total of 31-36.

The only interest sold by McCullough prior to the time of the institution of the suit was the 1-8 interest which he sold to the plaintiff Beth, by assignment under date of May 20, 1915 (Rec. 259). This left the ownership of the lease on the date of the filing of the bill, as follows:

J. C. Briggs	4-36	or 8-72
Thomas F. Phillips	1-36	or 2-72
B. C. Beth	1-8	or 9-72
W. P. McCullough	1-36	or
Less the 1-8 interest in the whole lease amounting to	9-72	or 53-72
		72-72

So that at the date of the filing of the suit, the entire title to the entire lease was in Briggs, Beth, Phillips and McCullough.

However, it further appears from the assignment made by J. C. Briggs to W. P. McCullough under date of June 28, 1917 (Rec. 269-270), that Briggs had, prior to the institution of the suit made an assignment to W. P. McCullough of all his interest in the lease; that the assignment of

June 28, 1917, "was made to take the place of a certain assignment theretofore made which had been lost before recording." Adding the Briggs interest of 8-72 to the 53-72 already standing in the name of McCullough, it would give McCullough an interest of 61-72, so that at that time the ownership of the lease stood as follows:

McCullough 61-72
Beth 9-72
Phillips 2-72

72-72

What McCullough Sold After Suit Was Filed.

Under date of April 14, 1917 (Rec. 306) McCullough assigns to Frank Gaines a 3-16 interest in the lease.

Under date of November 24, 1916, (Rec. 308) McCullough assigns to E. M. Landrum a 1-8 interest of 81-160 or approximately 1-16.

Under date of January 19, 1917 (Rec. 209) McCullough assigns to Mollie McCullough a 1-4 interest in the lease, but this is offset by a reconveyance of this same interest under date of April 14, 1917 (Rec. 260-261) by Mollie McCullough to W. P. McCullough. The testimony of Mr. McCullough as to this transaction was that he had been very ill and the doctors thought he was going to die, and he therefore assigned a 1-4 interest in the lease to his wife, Mollie McCullough.

The assignment from W. P. McCullough to Peter McCullough under date of July 7, 1916 (Rec. 310) of a 1-4 interest of 81-160, or 1-8 was offset by the re-assignment of that same interest by Peter McCullough to W. P. McCullough under date of July 9, 1919 (Rec. 270) the assignment specifically stating that it was made to take the place of an assignment theretofore made which had been lost before recording.

As to the assignment made under date of July 7, 1916, by W. P. McCullough to Theresa McClelland, of a 1-8 or 81-160 interest in the lease, that still stands, so that the record shows the following interests:

Frank Gaines	3-16
Theresa McClelland	1-16
E. M. Landrum	1-16
	5-16

Subtracting this 5/16 from 61-72 owned by McCullough, it would give a total interest of 77-164 standing in the name of W. P. McCullough, instead of the 1-9 as computed by the defendant.

From the above figures, it would appear that at the time the suit was filed, the entire title to the whole lease was in the three plaintiffs just as alleged in the petition; that at the time of the trial the whole title was still in the three plaintiffs with the exception of the interests standing

in the name of Frank Gaines, Theresa McClelland, Paul A. Ewert, A. C. Towne and E. M. Landrum, who were all made parties to the suit before judgment was rendered (Rec. 58). The fact that these additional parties who were not of interest at the time the suit was brought, now appear from the testimony taken at the trial, to be of interest, does not affect the questions at issue on the merits of the case.

In conclusion, we will only reiterate what the Circuit Court of Appeals said in rendering its judgment: (285 Fed. 702)

> "A forcible and persuasive argument is made to the effect that because the defendant drilled and developed the land in controversy at great expense and extracted lead and other minerals of great value from it, his equities are superior to those of the plaintiffs, but he did all this when the plaintiffs had an exclusive valid lease of, and right to secure the minerals, oil and gas in, the land described therein, duly recorded, and the defendant had full legal notice thereof. Parties without right or with inferior right to such property cannot acquire superior equities or rights to it to the rights and equities of recorded owners by boldly taking it with great activity at great expense. The owner has the right to it, and law and equity alike guard and protect that right."

This we think should dispose of the contention of the defendant that because he drilled and developed the land under his lease on the forty acres

East of the West eighty and went to a great expense in mining and extracting the minerals of great value therefrom, that that should be construed to give him equities that he otherwise would not have in the land that he did not develop, i. e. the land covered by the Hopper lease.

The testimony of all of the witnesses who testified in the court below who had anything to do with the land prior to April 29, 1915, show that on the 1st of May or about the 1st of May, 1915, there was absolutely no development, no work of any kind, no drilling or any prospecting on this 120 acre tract of iand covered by the Hopper lease and that in the early part of May, Hopper fixes the date as May 5, 1915, he commenced to develop it by sinking a shaft. McCullough had examined the land carefully, so had McNaughton, so had Briggs. Dallas Hopper lived on it and knew the land and was familiar with all of it, and when plaintiffs commenced to undertake to operate and develop the land, whether it was because there had been some drilling done on the forty East of the West eighty of his lease or not, is immaterial. Whether activity commenced in that vicinity in the way of prospecting and mining, is immaterial. The plaintiffs owned the lease on the 120 acre tract of land, they had kept the lieu money paid up, and more than paid up, and they commenced development work in May 1915, and did their best

to develop and mine the land and had it not been for Smith and his employees and sublessees they would have developed it and would have had the benefit of the great vast wealth of ore that has been taken from that land by Smith and his sublessees.

The plaintiffs had men who were willing and ready to drill the land and prospect for ore and go ahead and build a mill, and because of the interference of Smith and his lessees and their continually annoying, harassing and interfering with their work, even to the extent of arrests of their men and injunction proceedings, the plaintiffs have lost by the expiration of the ten years, all the wealth that would have come to them from the mining and extracting of the vast wealth of ore from said land.

This law suit must end somewhere in the near future. Since the commencement of it three of the lawyers in the case have died.

We submit to the court that the contention of the defendant that the plaintiffs abandoned the lease is wholly unfounded, in truth and in fact;

That the contention of defendant that the lieu money was not paid is untrue;

That the plaintiffs' lease on said land was a valid, subsisting lease for the term of ten years,

and that the plaintiffs are entitled to have the judgment of the lower court affirmed.

Respectfully submitted,

A. C. Towne, Miami, Oklahoma.
George J. Grayston, Joplin, Mo.
Chas. M. Grayston, Joplin, Mo.
Joseph C. Stone, Muskogee, Okla.
Solicitors for Appellees.



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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 22

WESLEY M. SMITH, *Appellant,*

vs.

W. P. McCULLOUGH, *ET AL., Appellees.*

SUPPLEMENTAL MEMORANDUM BRIEF UPON BEHALF OF APPELLEES.

The Decision of the Circuit Court of Appeals Must Be Affirmed Because No Plain Error Appears.

—*Texas & Pacific Ry. Co.* v. *Rosborough,* 235 U. S. 429, 59 L. ed. 299;

Southern Ry. Co. v. *Gadd,* 233 U. S. 572, 58 L. ed. 1099;

Chicago Junction Ry. Co. v. *King,* 222 U. S. 222, 56 L. ed. 173;

Empire State Mining Co. v. *Hanley,* 198 U. S. 292, 49 L. ed. 1056;

Page v. *Rogers,* 201 U. S. 575, 53 L. ed. 332;

Wood v. *Wilbert's Sons Lbr. Co.,* 226 U. S. 384, 57 L. ed 264;

Equity Rule No. 29.

The contention here made that the decision of the Circuit Court of Appeals must be affirmed because no plain error appears upon the record, rests upon the following grounds: *(1)* The decision of the Circuit Court of Appeals was in favor of the appellant on the only federal question or questions involved, and left only questions of general law or fact upon which to appeal to this court. *(2)* The appellant did not raise in his answer, or otherwise save by objection, exception or proper assignment, the principal question now briefed by appellant, namely: Was the mining lease through which the appellees claim void under the provisions of the Quapaw Leasing Act of June 7, 1897, which limits the term for which such lease may be made to the period of ten years?

Jurisdiction attached solely because the bill (Rec., pp. 1, 2) presented for interpretation the Act of Congress of June 21, 1905 (34 Stat. 325, 344), which act authorized Leander J. Fish, a Quapaw Indian, to alienate in the manner designated in the act, the land here involved. The defendants below, of whom appellant here was one, presented a motion to dismiss, which was sustained by the District Court, and thereupon the plaintiffs, appellees here, appealed to the Circuit Court of Appeals. That court decided the federal question or questions arising from said act authorizing Fish to alienate said land, in favor of the appellants. *McCullough* v. *Smith,* 243 Fed. 823, 829. Upon the case being remanded, the appellants answered (Rec., p. 12), presenting for trial and decision questions of fact only. The only questions of importance heard by the District Court were: *(1)* Was there an abandonment of the lease through which the appellees claim? *(2)* Did the appellees lose their rights under the lease because of the delay clause in the

lease or failure to pay delay money? The decision of the District Court was in favor of the appellees upon all the points. We find nothing in the record, by way of answer, objection, exception or assignment, presenting the question as to whether or not the appellees' lease was void because in contravention of the Quapaw Leasing Act of June 7, 1897. We contend that this question, if then any longer in the case, should have been raised as provided in Equity Rule 29, which is:

> "Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer."

Upon the second appeal the Circuit Court of Appeals affirmed the decision of the District Court, in an opinion, *Smith* v. *McCullough*, 285 Fed. 697, which presents only questions of fact and non-federal law.

The interpretation of the Quapaw Leasing Act of June 7, 1897, has not been involved in any of the proceedings. There is no point here as to the meaning of that act. It provides in plain terms that a Quapaw Indian may lease his allotment for mining purposes for the period of ten years, and no longer. It was contended by Smith, the appellant here, upon the first appeal to the Circuit Court of Appeals, and he now contends, that the Fish lease through which appellees claim is void because of certain language in the lease which appellant construes to mean that the lease was given for more than a ten-year term. Appellees admit that Fish could not lease for more than ten years and say that the language invoked in favor of the contention that the lease was

for more than ten years is separable from the terms of the lease fixing the ten-year period, and therefore the lease must be held to be valid for ten years. Such was the conclusion of the Circuit Court of Appeals. This is a non-federal question, because the contention does not call for the interpretation of said Quapaw Leasing Act limiting the term of a lease to ten years. The point involves merely a question of general law.

Thus it is manifest that the appellant won all his contentions with respect to every federal question involved, and he is here to present only questions of general law or facts, which this court will not consider because there is no plain error. See authorities *supra.*

In *Texas & Pacific Ry. Co.* v. *Rosborough,* 235 U. S. 429, jurisdiction attached solely because the plaintiff in error, a corporation, was organized under an Act of Congress. This court said:

> "We go no further than to inquire whether there is plain error. *Chicago Junction R. Co.* v. *King,* 222 U. S. 222, 224, 56 L. ed. 173, 174, 32 Sup. Ct. Rep. 79; *Texas & P. R. Co.* v. *Howell,* 224 U. S. 577, 582, 56 L. ed. 892, 894, 32 Sup. Ct. Rep. 601."

The *Smith-McCullough* case is here precisely in the situation presented in the case of *Texas & Pacific Ry. Co.* v. *Rosborough;* hence the same rule must apply.

Appellant cannot invoke in this court any federal question or questions determined in his favor by the Circuit Court of Appeals, as ground for taking the case out of the rule first above announced, namely, that the decision of the Circuit Court must be affirmed because there is no plain error. *Empire State Mining & Development Co.* v. *Hanley,* 198 U. S. 292, 43 L. ed. 1056.

In *Page* v. *Rogers*, 201 U. S. 575, 53 L. ed. 332, this court held:

> "Concurrent findings of fact of the two courts below, in a suit in equity, will be accepted by the Federal Supreme Court on appeal, unless error is clearly shown."

In *Wood* v. *Wilbert's Sons Lbr. Co.*, 226 U. S. 384, 57 L. ed. 264, this court said:

> "Objections not made in the court below, or not assigned as error on appeal, cannot be considered in the appellate court."

The contention of the appellees that appellant waived his right to contend that the Fish-Hopper lease, through which appellees claim, was void upon the alleged ground that same was taken in violation of the provisions of the Quapaw Leasing Act, is strengthened by the assignment of errors (Rec., pp. 289, 294), where it is said of this lease that it was "a periodical contract for a periodical lease, the periods to be one year, and to be at the option, at the beginning of each year to continue said contract for another year, and to be so continued for the full time of ten years * * *."

Respectfully submitted,

JOSEPH C. STONE,
A. C. TOWNE,
GEORGE J. GRAYSTON,
CHARLES M. GRAYSTON,
Attorneys for Appellees.

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No. 22

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

WESLEY M. SMITH, APPELLANT,

vs.

W. P. McCULLOUGH ET ALS., APPELLEES,

MEMORANDUM BRIEF UPON BEHALF OF APPELLANT.

ARTHUR S. THOMPSON,
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Attorney for Appellant.

IN THE

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MEMORANDUM.

Counsel for appellant received typewritten copy of supplemental brief offered by appellees only a few hours before taking train to be in attendance upon this court. Our excuse for this memorandum is only that we may again, in a short and concise manner, bring to the attention of this court certain questions here involved that seem to have escaped the attention of counsel for appellees in the preparation of their supplemental brief just offered.

I.

Jurisdiction in this cause is based on averment of the bill (R. 1) that

(1) Pursuant to Act of Congress approved March 2, 1895 (28 Stat., 927), Leander J. Fish, a member of the Quapaw

tribe of Indians, received by patent from the United States title to the lands here involved.

(2) That thereafter on June 21, 1906, an Act of Congress (34 Stat., 325, 344) was approved, permitting this same allottee to alienate his allotted lands subject to the approval of the Secretary of the Interior.

(3) That the allottee alienated his land by mortgage approved by the Secretary of the Interior and thereafter leased same for mining purposes to appellees' assignor.

The appellant here (defendant in trial court) filed a motion to dismiss (R. 11-13) the bill for the reason that the insufficiency of facts averred to constitute any valid cause of action in equity appeared on the face of the bill. The motion then contained a statement of the facts plead, showing the insufficiency.

There were two questions immediately presented to the court by the motion:

(*a*) Did the approval of the Secretary of the Interior placed on the mortgage of the allottee remove the restriction against alienation imposed by Act of Congress approved March 2, 1895, *supra,* and if not

(*b*) Was the lease of plaintiffs given for 10 years "and so long thereafter as ores may be found in paying quantities," etc., in violation of the restriction imposed by the allotment act cited and violative of the leasing statute approved by Congress June 7, 1897 (30 Stat. at L. 72), permitting a lease only for 10 years.

The trial court decided both questions adversely to the appellees. The two questions involving a discussion and

construction of the three Acts of Congress cited were presented to the Circuit Court of Appeals. The court in its opinion (R. 17-28) clearly shows this. This opinion on the first appeal settled the law of the case for the trial court as we view the practice. We raised the questions by our motion. The main question, to wit: Was the lease authorized by or was it in violation of the Acts of Congress, was decided against the appellant (here). We had no right of appeal at the time. The same question was argued again to the trial court when returned for trial. The court was bound by the decision of the Circuit Court of Appeals. When the case reached the Circuit Court of Appeals the second time we again presented the same questions on proper and sufficient assignment (R. red paging 323-329). The opinion of the Court of Appeals (R. 335-340) at page 338 Record, makes this clear.

Counsel are mistaken when they observe that the allotment act of March 2, 1895, *supra*, and the leasing act of June 7, 1897, *supra*, have not been involved. The questions were properly raised in the motion to dismiss, and we are now for the first time before a court not bound by the rule of law declared in this case seeking a review of the action on our motion.

Respectfully submitted,

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Attorney for Appellant.